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# MINIMUM PHYSICAL STANDARDS—SAFEGUARDING THE RIGHTS OF PROTECTIVE SERVICE WORKERS UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT

## INTRODUCTION

In 1967, Congress formally addressed the growing problem of age discrimination in the workplace when it passed the Age Discrimination in Employment Act ("ADEA").<sup>1</sup> The ADEA makes it illegal for employers to use age as the primary employment criterion in both hiring and termination situations.<sup>2</sup> Its principal purpose is to ensure that employment determinations are based on objective, age-neutral criteria such as individual ability, and not on subjective, unsubstantiated age-based presumptions.<sup>3</sup> Employment decisions predicated on stereotyped assumptions concerning the degenerative effects of aging on performance and ability are thus prohibited under the Act.<sup>4</sup>

Although the ADEA protects most employees over the age of 40,<sup>5</sup> certain persons are not covered. Specifically, most state and local government protective service workers such as law enforcement officers and firefighters,<sup>6</sup> the focus of this Note, face mandatory retirement at age 55 as a result of the 1986 amendments to the ADEA.<sup>7</sup> Federal law enforce-

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1. Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621-634 (1982)).

2. See 29 U.S.C. § 623(a)(1) (1982). For a general discussion of the ADEA's substantive provisions, see C. Edelman & I. Siegler, *Federal Age Discrimination in Employment Law: Slowing Down the Golden Watch* 73-241 (1978).

3. See *EEOC v. University of Texas Health Science Center*, 710 F.2d 1091, 1094 (5th Cir. 1983); *EEOC v. County of Santa Barbara*, 666 F.2d 373, 376 (9th Cir. 1982); H.R. Rep. No. 805, 90th Cong., 1st Sess. 1, reprinted in 1967 U.S. Code Cong. & Admin. News 2213, 2214.

4. See *Orzel v. City of Wauwatosa Fire Dep't*, 697 F.2d 743, 755 (7th Cir.), cert. denied, 464 U.S. 992 (1983); *County of Santa Barbara*, 666 F.2d at 376; *Aaron v. Davis*, 414 F. Supp. 453, 461 (E.D. Ark. 1976).

5. The ADEA originally applied only to private sector employers with more than twenty-five employees. In 1974, Congress expanded the definition of "employer" to include the federal government as well as state and local governments. See *The Fair Labor Standards Amendments of 1974*, Pub. L. No. 93-259, § 28(a)(2), 88 Stat. 55, 74.

6. The term "protective service" worker or "employee" encompasses firefighters; traditional law enforcement personnel such as police officers, state troopers and highway patrolmen; and non-traditional law enforcement personnel such as conservation officers and highway tax enforcement officers. The common characteristic shared by these employees is their principal job function—the promotion of third party or public safety.

7. See *The Age Discrimination in Employment Act Amendments of 1986*, Pub. L. No. 99-592, § 3(a)(i), 100 Stat. 3342 (codified as amended at 29 U.S.C. § 623(i) (Supp. IV 1986)). Although Congress removed the ADEA's upper age limit in 1986, see *id.* § 2(c), effectively eliminating mandatory retirement for most workers, it created an exception for non-federal law enforcement officers and firefighters which exempts them from the Act's protection. See 29 U.S.C. § 623(i) (Supp. IV 1986). State and local governments are now free to enforce the mandatory retirement of firefighters and law enforcement officers, or to refuse to hire an applicant for such positions, solely on the basis of age. See *id.* Because the amendment is self-repealing, however, firefighters and law enforcement officers

ment agents, firefighters and air traffic controllers also are not protected by the Act.<sup>8</sup>

In addition to the exemption of specific classes of employees, the ADEA provides affirmative defenses to charges of age discrimination. The most frequently invoked<sup>9</sup> of these defenses is the bona fide occupational qualification ("BFOQ") exception.<sup>10</sup> This exception has generated much litigation,<sup>11</sup> especially in the protective service<sup>12</sup> and transportation<sup>13</sup> industries—areas in which public safety concerns are of manifest

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will again be subject to ADEA protection as of January 1, 1994. See Pub. L. No. 99-592, § 3(b), 100 Stat. 3342 (1986).

The provisional exclusion of firefighters and law enforcement officers from the ADEA, however, does not render the issue of minimum physical standards for protective service employees moot. See *infra* note 34 (discussing concept of minimum physical standards). First, the amendment contains a savings clause which preserves all claims arising before January 1, 1987. See Pub. L. No. 99-592, § 7(b), 100 Stat. 3342, 3345 (1986).

Second, the scope of the amendment is unclear because not all protective service workers are specifically included within the definitions established under the amendment. The term "law enforcement officer" is not precisely defined. See 29 U.S.C. § 630(k) (Supp. IV 1986). For example, it is unclear whether conservation officers fall within this category. At least one court has suggested that they do not. See *EEOC v. Tennessee Wildlife Resources Agency*, 859 F.2d 24 (6th Cir. 1988) (In its companion case, *EEOC v. Kentucky State Police Department*, 860 F.2d 665 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 2066 (1989), the court specifically noted that plaintiff's action was preserved under the savings clause. *Id.* at 669. In *EEOC v. Tennessee*, reference to the savings clause was omitted, suggesting that it was not needed to preserve the claim because it was not affected by the 1986 amendment.), *cert. denied*, 109 S. Ct. 1342 (1989). Exactly what occupations fall within the definitions under the amendment is certain to be the focus of prospective litigation. See, e.g., *EEOC v. Massachusetts*, 680 F. Supp. 455 (D. Mass. 1988) (holding that Massachusetts Registry of Motor Vehicles examiners are "law enforcement officers" for purposes of the 1986 ADEA amendments), *aff'd*, 858 F.2d 52 (1st Cir. 1988). As courts answer this question, protective service employees held still to be protected under the ADEA are certain to bring actions challenging mandatory retirement statutes, thereby preserving the significance of the minimum physical standards question.

Finally, the validity of physical fitness tests as indicators of the ability of firefighters and law enforcement officers to perform their jobs is currently being studied by the Secretary of Labor and the EEOC, with Congress to be advised accordingly. See 29 U.S.C. § 622(a) (Supp. IV 1986).

8. See 5 U.S.C. § 8335 (1982). Firefighters and law enforcement agents are subject to mandatory retirement at the age of 55 or after the completion of "20 years of service if then over that age." *Id.* § 8335(b). Air traffic controllers are generally subject to mandatory retirement at age 56. See *id.* § 8335(a).

9. See Rosenblum, *Age Discrimination in Employment and the Permissibility of Occupational Age Restrictions*, 32 Hastings L.J. 1261, 1266 (1981).

10. See 29 U.S.C. § 623(f)(1) (1982).

11. See *Retirement Policies For Public Safety Officials: Hearing Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources*, 99th Cong., 2d Sess. 217-20 (1986) [hereinafter *Retirement Policies*] (partial list of lawsuits filed by the EEOC against state and local protective service employers).

12. See *id.*

13. See, e.g., *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985) (commercial airline); *Iervolino v. Delta Air Lines*, 796 F.2d 1408 (11th Cir. 1986) (same), *cert. denied*, 479 U.S. 1090 (1987); *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976) (intercity bus carrier).

importance.<sup>14</sup>

The BFOQ exception authorizes employers to discriminate on the basis of age "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business."<sup>15</sup> An employer invoking the exception concedes that age was the determinative factor in its decision, but seeks to legitimate the decision by showing that it was "necessary given the nature of the business."<sup>16</sup> Under the exception, an employer can rebut a plaintiff's claim of age discrimination by proving that it is compelled to rely on age as a proxy for particular job qualifications.<sup>17</sup>

The ADEA and its legislative history do not articulate the standard employers must meet in order to exculpate themselves under the BFOQ defense when public safety considerations are involved.<sup>18</sup> Consequently, interpretation of the BFOQ exception has been left to the federal judiciary. Under a two-pronged<sup>19</sup> test formulated by the Fifth Circuit in *Usery v. Tamiami Trail Tours, Inc.*,<sup>20</sup> and formally adopted by the Supreme Court in *Western Air Lines, Inc. v. Criswell*,<sup>21</sup> (the *Tamiami/Criswell* standard), a safety-related job qualification will qualify as a BFOQ when the employer demonstrates two points. First, the qualification must be reasonably necessary to the essence of the employer's business.<sup>22</sup> Second, there must be a factual basis, predicated on empirical data, for the employer's believing either (a) that all or substantially all persons over the specified age possess characteristics precluding safe or efficient performance of the duties of the job involved, or (b) that individualized assess-

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14. See Note, *The BFOQ Defense in ADEA Suits: The Scope of "Duties of the Job,"* 85 Mich. L. Rev. 330, 333 n.21 (1986).

15. 29 U.S.C. § 623(f)(1) (1982).

16. EEOC v. County of Allegheny, 519 F. Supp. 1328, 1334 (W.D. Pa. 1981), *aff'd*, 705 F.2d 679 (3d Cir. 1983).

17. Once a plaintiff makes out a prima facie case of discrimination under the ADEA, the burden shifts to the defendant to furnish evidence justifying its actions under one of the Act's defenses. See EEOC v. New Jersey, 631 F. Supp. 1506, 1507 (D.N.J. 1986), *aff'd*, 815 F.2d 694 (3d Cir. 1987); Marshall v. Westinghouse Elec. Corp., 576 F.2d 588, 591 (5th Cir. 1978); Aaron v. Davis, 414 F. Supp. 453, 460 (E.D. Ark. 1976); cf. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (Title VII plaintiff bears initial burden of establishing prima facie case of race discrimination whereupon burden shifts to employer "to articulate some legitimate, nondiscriminatory reason for the employee's rejection."). See generally Schickman, *The Strengths and Weaknesses of the McDonnell Douglas Formula in Jury Actions Under the ADEA*, 32 Hastings L.J. 1239 (1981) (general discussion of burdens of proof under ADEA).

18. See Note, *Striking a Balance Between the Interests of Public Safety and the Rights of Older Workers: The Age BFOQ Defense*, 39 Wash. & Lee L. Rev. 1371, 1374-75 (1982); see also *infra* notes 53-54 and accompanying text.

19. The two prongs of the standard are not mutually exclusive—the employer must satisfy its burden under *both* prongs. These prongs must be addressed sequentially—reaching the second prong is dependent upon the employer's meeting its evidentiary burden under the first. See EEOC v. Tennessee Wildlife Resources Agency, 859 F.2d 24, 25 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 1342 (1989).

20. 531 F.2d 224 (5th Cir. 1976).

21. 472 U.S. 400 (1985).

22. See *Tamiami*, 531 F.2d at 235-36; *Criswell*, 472 U.S. at 413-17.

ments of most persons over the designated age are either impossible or impractical.<sup>23</sup>

The "reasonable necessity" requirement under the first prong guarantees that the asserted occupational qualification is more than incidentally related to the essence of the employer's business.<sup>24</sup> The second prong ensures that the employer is compelled to rely on age as a proxy for the qualification asserted under the first prong, foreclosing the possibility of employment decisions absent reference to age.<sup>25</sup>

Although the BFOQ defense was intended " 'to be an extremely narrow exception to the general prohibition' of age discrimination contained in the ADEA,"<sup>26</sup> courts have suggested that where public safety is the essence of an employer's business, the employer faces a less stringent evidentiary burden than it would normally face in satisfying the *Tamiami/Criswell* standard.<sup>27</sup> A corollary to this conclusion is that employers have broader discretion to impose more stringent job requirements when risks to public safety are involved.<sup>28</sup> This relaxed burden and the in-

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23. See *Tamiami*, 531 F.2d at 235-36; *Criswell*, 472 U.S. at 413-17.

24. See *EEOC v. Mississippi State Tax Comm'n*, 848 F.2d 526, 534 (5th Cir. 1988) (Jones, J., specially concurring), *vacated and remanded*, 873 F.2d 97 (5th Cir. 1989).

In cases where the essence of the employer's business is public safety, the inquiry under the first prong " 'adjusts to the safety factor' by ensuring that the employer's restrictive job qualifications are 'reasonably necessary' to further the overriding interest in public safety." *Criswell*, 472 U.S. at 413.

25. See *Criswell*, 472 U.S. at 414.

Although the BFOQ exception is one of several affirmative defenses available under the ADEA, it is the only one which allows the employer to rely exclusively on age in making its employment decisions. Two other defenses—differentiations based on "reasonable factors other than age," 29 U.S.C. § 623(f)(1) (1982), and dismissal or disciplinary action for "good cause," *id.* § 623(f)(3)—play an interesting role regarding the implementation of minimum physical standards. See *infra* notes 232-34 and accompanying text.

For a thorough discussion of the defenses available under the ADEA, see Player, *Defenses Under the Age Discrimination in Employment Act: Misinterpretation, Misdirection, and the 1978 Amendments*, 12 Ga. L. Rev. 747 (1978).

26. *Criswell*, 472 U.S. at 412 (quoting *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977)); see also 29 C.F.R. § 1625.6 (1988) ("It is anticipated that this concept of a [BFOQ] will have limited scope and application.").

27. See *Tuohy v. Ford Motor Co.*, 675 F.2d 842, 845 (6th Cir. 1982); *Maki v. Commissioner of Educ.*, 568 F. Supp. 252, 254-55 (N.D.N.Y. 1983), *aff'd*, 742 F.2d 1437 (2d Cir. 1984); *Hoefelmann v. Conservation Comm'n*, 541 F. Supp. 272, 275 (W.D. Mo. 1982), *aff'd*, 718 F.2d 281 (8th Cir. 1983); *Beck v. Borough of Manheim*, 505 F. Supp. 923, 925 (E.D. Pa. 1981); cf. *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859, 863 (7th Cir. 1974) (employer had to demonstrate only a "rational basis in fact" for its belief that suspension of its maximum hiring age for inter-city bus drivers would increase the "likelihood of risk of harm to its passengers"), *cert. denied*, 419 U.S. 1122 (1975).

Although the employer's burden of proof is apparently reduced for occupations implicating public safety, the ADEA still requires empirical evidence demonstrating a correlation between the specified age limitation and the particular job involved. See *Aaron v. Davis*, 414 F. Supp. 453, 461 (E.D. Ark. 1976).

28. See *EEOC v. Missouri State Highway Patrol*, 748 F.2d 447, 450 (8th Cir. 1984), *cert. denied*, 474 U.S. 828 (1985); *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236 (5th Cir. 1976); cf. *Murnane v. American Airlines, Inc.*, 667 F.2d 98, 101 (D.C. Cir. 1981) (airline industry afforded wide discretion in determining which methods of operation will optimize safety), *cert. denied*, 456 U.S. 915 (1982).

creased judicial deference to employer determinations purportedly represent a compromise between two competing and arguably irreconcilable interests: promoting the employment of qualified older individuals under the ADEA versus effectively addressing employers' concerns for the safety of third persons.<sup>29</sup>

Effectively balancing these considerations has proved difficult when public safety is implicated, leading some courts to accord undue deference to employers' averments that their asserted job qualifications are reasonably related to the essence of their business.<sup>30</sup> This reduced evidentiary burden and the concomitant sanctioning of a greater degree of employer discretion in the selection of mandatory retirement ages and occupational qualifications, however, "[do] not relieve the defendant of its burden of establishing *both* elements of the BFOQ defense."<sup>31</sup>

The BFOQ exception is invoked frequently by protective service employers seeking to validate statutory entry-level age limits and mandatory retirement ages.<sup>32</sup> Unfortunately, the conflict between promoting public

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29. See *EEOC v. County of Santa Barbara*, 666 F.2d 373, 376 (9th Cir. 1982); *Tamiami*, 531 F.2d at 239-40 (Brown, C.J., concurring).

30. See, e.g., *EEOC v. City of E. Providence*, 798 F.2d 524, 529 & n.4 (1st Cir. 1986); *EEOC v. Missouri*, 748 F.2d at 450; *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859, 862-63 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975); *Spurlock v. United Airlines, Inc.*, 475 F.2d 216, 219 (10th Cir. 1972); see also Note, *A New Interpretation of the BFOQ Exception Under the ADEA: A Remedy for the Exception that Swallowed the Rule*, 31 Am. U.L. Rev. 391, 400 (1982) (courts have shown undue sympathy to employers' claims of public safety, leading to an "unacceptably broad reading" of the BFOQ exception).

31. *Hahn v. City of Buffalo*, 596 F. Supp. 939, 945 (W.D.N.Y. 1984), *aff'd*, 770 F.2d 12 (2d Cir. 1985) (emphasis added).

32. See, e.g., *EEOC v. Kentucky State Police Dep't*, 860 F.2d 665, 666 (6th Cir. 1988) (retirement age of 55 for state police officers), *cert. denied*, 109 S. Ct. 2066 (1989); *EEOC v. Mississippi*, 837 F.2d 1398, 1399 (5th Cir. 1988) (retirement age of 62 and maximum hiring age of 35 for state conservation officers); *EEOC v. Pennsylvania*, 829 F.2d 392, 393 (3d Cir. 1987) (retirement age of 60 for state police officers), *cert. denied*, 108 S. Ct. 1109 (1988); *EEOC v. Missouri State Highway Patrol*, 748 F.2d 447, 448 (8th Cir. 1984) (retirement age of 60 and maximum hiring age of 32 for state highway patrolmen), *cert. denied*, 474 U.S. 828 (1985); see also *Retirement Policies*, *supra* note 11, at 217-20 (listing ADEA cases filed by the EEOC).

Protective service employers characteristically advance the same arguments, contending that health and physical fitness are integral job qualifications under the first prong of the *Tamiami/Criswell* standard because the essence of their business is the promotion of public safety. See, e.g., *EEOC v. Missouri*, 748 F.2d at 451-55; *EEOC v. State Dep't of Highway Safety and Motor Vehicles*, 660 F. Supp. 1104, 1108 (N.D. Fla. 1986). They argue that aging catalyzes an array of physiological changes which lead to an overall physical degeneration and have a negative effect on the ability of protective service employees to perform their jobs. See, e.g., *EEOC v. Missouri*, 748 F.2d at 452; *EEOC v. Pennsylvania*, 645 F. Supp. 1545, 1550-52 (M.D. Pa. 1986), *vacated and remanded*, 829 F.2d 392 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 1109 (1988); *EEOC v. Pennsylvania Liquor Control Bd.*, 565 F. Supp. 520, 522 (E.D. Pa. 1983); cf. *Houghton v. McDonnell Douglas Corp.*, 413 F. Supp. 1230, 1236-37 (E.D. Mo. 1976) (description of age-related physical degeneration which negatively affects ability of airplane pilots), *rev'd on other grounds*, 553 F.2d 561 (8th Cir. 1977).

The results reached in these cases are "'all over the lot'[, however,] with little consistency seen even between cases in which the 'essence of the business' appears to be identical." *EEOC v. New Jersey*, 620 F. Supp. 977, 982 (D.N.J. 1985). A major reason for the

safety and eradicating ageism in employment has generated confusion regarding the nature and quantum of evidence that employers must adduce to successfully invoke the exception.

Courts disagree whether employers must develop and enforce minimum standards of health and physical fitness<sup>33</sup> to prove that such qualifications are reasonably necessary to the essence of their business, and to defend their enforcement of mandatory retirement ages on that basis. The split essentially turns on whether the failure to implement and enforce minimum physical standards is merely evidence of an employer's lack of commitment to the continued health and fitness of its employees, or whether this failure is so probative as to compel the finding that, as a matter of law, physical fitness is not reasonably necessary to the essence of its business.<sup>34</sup>

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lack of judicial agreement is the fact-specific nature of the cases. *See id.*; *Stewart v. Smith*, 673 F.2d 485, 491 n.26 (D.C. Cir. 1982). Thus, mandatory retirement schemes for similar types of protective service employees have been held valid in some jurisdictions and violative of the ADEA in others. *See Nelson & Roberts, Mandatory Retirement and Police Employment*, 14 J. Police Sci. & Admin. 6, 7-8 (1986); *Retirement Policies*, *supra* note 11, at 137-38. It is not anomalous for courts to reach divergent conclusions, however, when they cannot agree on the nature and degree of evidence that will satisfy the *Tamiami/Criswell* standard. *See infra* notes 34-44 and accompanying text.

33. The development and implementation of minimum physical standards involves establishing a program for maintaining the physical fitness of all employees, regardless of age. The fundamental component is a complete annual physical examination to ensure that all employees possess a threshold level of physical and medical fitness and to identify individuals with obvious health risks that either exclude them from continued employment or which preclude further testing for specific physical attributes such as strength and aerobic capacity. Following this initial screening, employees should be tested for compliance with the level of physical ability required for the safe and successful performance of their particular duties.

Assessment of an employee's fitness for his particular job involves an initial identification of the tasks that are performed in that job, followed by a determination of the physiological attributes such as strength, endurance and aerobic capacity necessary for the safe and efficient performance of those tasks. *See EEOC v. Pennsylvania*, 645 F. Supp. 1545, 1547-50 (M.D. Pa. 1986), *vacated and remanded*, 829 F.2d 392 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 1109 (1988); *EEOC v. New Jersey*, 631 F. Supp. 1506, 1510 (D.N.J. 1986), *aff'd*, 815 F.2d 694 (3d Cir. 1987). An employee who fails to meet the requisite standards for his job responsibilities should face disciplinary action such as temporary suspension, reassignment to lighter duty, or transfer to a position for which he is physically qualified if the failure is based on a correctable condition. Individuals who are permanently disabled or who possess ailments such as diagnosed heart conditions, which may completely preclude the safe and efficient performance of their present duties, should either be mandatorily retired or, if possible, reassigned to a position involving only minimal physical exertion.

The institution of minimum physical standards through a comprehensive physical fitness program is possible. *See EEOC v. New Jersey*, 631 F. Supp. at 1508 (New Jersey's state police have instituted a full-scale program for all sworn officers); *Retirement Policies*, *supra* note 11, at 38 (as of 1986, "[a]t least 18 states have physical fitness/health programs for state law enforcement officers" and at least 10 major cities have instituted physical fitness/training programs). In fact, the institution of some type of continued physical fitness standard is becoming more prevalent, usually implemented through labor agreements. *See id.* at 108-17.

34. *Compare EEOC v. City of E. Providence*, 798 F.2d 524, 530 (1st Cir. 1986) (absence of minimum physical standards does not bar finding that health and fitness are

In the First<sup>35</sup> and Eighth<sup>36</sup> Circuits, a protective service employer's failure to implement minimum physical standards for all employees does not preclude a finding that health and physical fitness are BFOQs. In these circuits, an employer can validate its mandatory retirement policy under the second prong of the BFOQ test by relying primarily on evidence concerning the diminished ability of older workers to perform their jobs.<sup>37</sup> There is no corresponding requirement that the employer empirically corroborate its subjective belief that most employees *below* the mandatory retirement age actually possess the level of health and fitness it has labeled essential.<sup>38</sup>

Under the approach taken in the Third<sup>39</sup> and Sixth<sup>40</sup> Circuits, conversely, an employer is expressly prevented from establishing health and physical stamina as BFOQs unless minimum physical standards are de-

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reasonably necessary job qualifications) with *EEOC v. Pennsylvania*, 829 F.2d 392, 395 (3d Cir. 1987) (health and physical fitness cannot be reasonably necessary job qualifications until minimum physical standards are implemented), *cert. denied*, 108 S. Ct. 1109 (1988).

Correctly characterizing the nature of the failure to implement minimum physical standards is critical. If it is merely evidence that physical fitness is not reasonably necessary to the essence of the employer's business operation, the court will usually make an inquiry under the second prong of the *Tamiami/Criswell* standard. Under this prong, the employer can then introduce evidence regarding the difficulties in individually monitoring health and fitness in order to legitimize its failure to implement minimum standards. Conversely, if the absence of these standards thoroughly contradicts the employer's claim that physical fitness is reasonably necessary to the essence of its business, the court must terminate its inquiry and invalidate the employer's mandatory retirement scheme under the first prong of the standard without ever making an inquiry under the second prong.

35. See *EEOC v. City of E. Providence*, 798 F.2d 524 (1st Cir. 1986).

36. See *EEOC v. Missouri State Highway Patrol*, 748 F.2d 447 (8th Cir. 1984), *cert. denied*, 474 U.S. 828 (1985).

37. See *City of E. Providence*, 798 F.2d at 528; *EEOC v. Missouri*, 748 F.2d at 455.

A major area of contention is the meaning of the term "occupational qualification." Courts disagree whether the term applies to the particular duties performed by an individual employee, or to the duties performed by the generic class of employees. See *Mahoney v. Trabucco*, 738 F.2d 35, 38-39 (1st Cir.) (purportedly adopted an intermediate standard focusing on "recognized and discrete vocation[s]" within the business—analysis by rank or job category—but actually eschewed a particularistic analysis and imposed a general BFOQ for all employees, regardless of current position or rank), *cert. denied*, 469 U.S. 1036 (1984); *EEOC v. City of St. Paul*, 671 F.2d 1162, 1165-66 (8th Cir. 1982) (proffered qualifications must be reasonably necessary to the essence of employee's particular job, rather than to generic class of employees); *EEOC v. City of Janesville*, 630 F.2d 1254, 1258 (7th Cir. 1980) (term applies to duties of generic class of employees and not discrete duties performed by an individual employee; where public safety is implicated, an employer may be overly cautious in requiring that all personnel be able to perform all jobs in that business). See generally Note, *supra* note 14 (analyzing this three-way split); Note, *The Bona Fide Occupational Qualification Exception—Clarifying the Meaning of "Occupational Qualification"*, 38 Vand. L. Rev. 1345 (1985) (same).

38. See, e.g., *City of E. Providence*, 798 F.2d at 529 n.4.

39. See *EEOC v. Pennsylvania*, 829 F.2d 392 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 1109 (1988).

40. See *EEOC v. Kentucky State Police Dep't*, 860 F.2d 665 (6th Cir. 1988); *EEOC v. Tennessee Wildlife Resources Agency*, 859 F.2d 24 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 2066 (1989).



veloped and enforced on a full-scale, non-discriminatory basis.<sup>41</sup> On this side of the dispute, public safety considerations alone are not sufficiently probative of whether the protective service employer's alleged job qualifications are reasonably necessary to the essence of its business. Rather, the imposition of physical standards for older workers through compulsory retirement, coupled with the failure to implement minimum physical standards for younger officers, is tantamount to a "selective age-based enforcement of health and fitness requirements,"<sup>42</sup> which the ADEA expressly prohibits. Consequently, mandatory retirement policies which do not require minimum physical standards for all employees have been invalidated because their effect in promoting public safety does not outweigh the violation of the rights of older employees under the ADEA.

In addition, a third approach was recently announced by the Fifth Circuit, which has held that the weight to be given a protective service employer's failure to implement minimum physical standards "is for the fact finder to decide, with its finding subject to appropriate appellate review on the entire record."<sup>43</sup> Under this formulation, a court could hold either that the employer's failure to implement minimum physical standards invalidates that employer's mandatory retirement policy or that the absence of minimum physical standards, without more, does not pre-

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41. The dispositive significance of an employer's failure to implement minimum standards for assessing the health and fitness of all employees has also been observed by other courts. See *Heiar v. Crawford County*, 746 F.2d 1190, 1198-99 (7th Cir. 1984) (defendant's failure to subject any officers to periodic physical examinations cast doubt on "genuineness" of its concern with physical fitness of its employees and belied claim that youthfulness was a prerequisite for county police officers), *cert. denied*, 472 U.S. 1027 (1985); *EEOC v. State Dep't of Highway Safety & Motor Vehicles*, 660 F. Supp. 1104, 1110 (N.D. Fla. 1986) ("Finally, and perhaps most telling, is the fact that despite all its claims of concern about the physical fitness of troopers, FHP does not even require troopers to undergo any physical examination once they are employed."); *EEOC v. New Jersey*, 620 F. Supp. 977, 983-84 (D.N.J. 1985) (had defendant made no attempt to monitor fitness of officers and allowed those with known physical disabilities to remain on force, reasonable necessity of requirements of good health and physical conditioning would have been suspect).

42. *EEOC v. Pennsylvania*, 829 F.2d at 395.

43. *EEOC v. Mississippi State Tax Comm'n*, 873 F.2d 97, 99 (5th Cir. 1989). The Fifth Circuit had originally adopted the approach taken by the Third and Sixth Circuits. See *EEOC v. Mississippi State Tax Comm'n*, 848 F.2d 526 (5th Cir. 1988), *vacated and remanded*, 873 F.2d 97 (5th Cir. 1989); *EEOC v. Mississippi*, 837 F.2d 1398 (5th Cir. 1988). The Fifth Circuit recently reconsidered its position, however, and declined "to hold that physical fitness can never be held to be reasonably necessary for job performance unless the employer has established formal standards and monitoring procedures." *EEOC v. Mississippi State Tax Comm'n*, 873 F.2d at 98. Specifically, the court held that the importance to be accorded an absence of minimum physical standards was to be left to the fact finder, to be determined on a case-by-case basis. See *id.* at 99. In re-evaluating its position, however, the Fifth Circuit explicitly refused to disturb its holding in *EEOC v. Mississippi*. Consequently, although the Fifth Circuit apparently has departed from the hard line approach of the Third and Sixth Circuits, that approach can still be adopted by a Fifth Circuit fact finder as long as the court examines each case according to its own specific set of facts.

vent an employer from establishing health and physical fitness as BFOQs.

This Note asserts that for protective service employers to avail themselves of the BFOQ exception as defined by the *Tamiami/Criswell* standard, they must implement minimum physical standards for all employees. Part I demonstrates that the failure to implement uniform minimum physical standards leads to an over-broad construction of the BFOQ exception, contravening congressional intent in promulgating the ADEA, as evidenced by the Act's legislative history and the interpretive bulletins issued to counsel in its administration. Part II traces the development of the *Tamiami/Criswell* standard and concludes that minimum physical standards and periodic testing are required by the case law which defines the contours of the standard. Part III analyzes the general arguments advanced by protective service employers and concludes that the Third, Fifth and Sixth Circuits are correct in mandating the implementation of minimum physical standards. This section also demonstrates that the use of minimum physical standards may reduce the evidentiary problems faced by employers under both prongs of the BFOQ test, and that these standards may render the BFOQ defense superfluous in many protective service cases.

#### I. THE ADEA—TEXT, LEGISLATIVE HISTORY AND INTERPRETIVE GUIDELINES

In 1964, Congress enacted Title VII of the Civil Rights Act of 1964<sup>44</sup> ("CRA") in order to eradicate unlawful discrimination in the workplace. Although Congress originally considered including a proscription against age discrimination in Title VII,<sup>45</sup> references to age were dropped from

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44. 42 U.S.C. §§ 2000e to 2000e-17 (1982). Title VII targets discriminatory employment practices based on race, religion, sex or national origin. See *id.* § 2000e-2.

45. See 110 Cong. Rec. 2596-99 (1964) (amendment sponsored by Rep. Dowdy); 110 Cong. Rec. 9911-16 (1964) (amendment sponsored by Sen. Smathers). These amendments were rejected 123-94 and 63-28, respectively. See Eglit, *The Age Discrimination in Employment Act's Forgotten Affirmative Defense: The Reasonable Factors Other Than Age Exception*, 66 B.U.L. Rev. 155, 161 n.16 (1986). For a discussion of the relationship between Title VII and the ADEA, see Note, *The Age Discrimination in Employment Act of 1967*, 90 Harv. L. Rev. 380 (1976).

The reason for this rejection is unclear. In *EEOC v. Wyoming*, 460 U.S. 226, 229 (1983), the Supreme Court posited that opposition to the amendments was based, in part, on Congress' lack of information "about the nature of age discrimination." What is apparent, however, is that age discrimination traditionally has been considered less insidious than the types of discrimination targeted by Title VII. See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313-14 (1976) (*per curiam*); see also 113 Cong. Rec. 34,742 (1967) (remarks of Rep. Burke) (distinguishing age discrimination from that based on race, creed and bigotry—the latter is based on perceptions totally unrelated to an individual's ability to do his job while the former is based on assumptions concerning effects of aging on job performance); Eglit, *supra*, at 220 (discussing Rep. Burke's remarks).

Although it is anomalous to suggest that age discrimination is more tolerable because it is based on misguided assumptions rather than broad-based animus, this difference in

the final version of the statute.<sup>46</sup>

Competent older workers, however, were being forced out of the workplace on the basis of assumptions regarding the correlation between age and diminished ability.<sup>47</sup> The growing national concern with the plight of older workers culminated in the enactment of the ADEA.<sup>48</sup> Although tripartite in purpose,<sup>49</sup> the ADEA's primary objective is the promotion of employment opportunities for older workers through the elimination of ageism in employment.<sup>50</sup> It mandates that employment decisions be based on individualized, age-neutral assessments of ability.<sup>51</sup>

Despite the ADEA's sweeping proscription of arbitrary age discrimi-

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perception has led some courts to conclude that because age discrimination is less offensive, an employer's claims that it is acting in good faith are sufficient to sustain an age-based ADEA BFOQ defense. *See, e.g.,* EEOC v. City of Janesville, 630 F.2d 1254, 1258-59 (7th Cir. 1980); *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859, 865 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975).

46. Section 715 of the CRA instructed Secretary of Labor Wirtz to study the problem and its consequences and transmit his findings to Congress. *See* Civil Rights Act of 1964, § 715, 78 Stat. 241, 265 (codified at 42 U.S.C. § 2000e-14). His final report, which called for federal action to eliminate the pervasive problem of age discrimination in the workplace, dispelled any doubt Congress might previously have harbored regarding the plight of older workers. *See* U.S. Dep't of Labor, *The Older American Worker—Age Discrimination in Employment—Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964: Research Materials 67-69* (1965).

47. President Johnson, in his Older American Message to Congress of January 23, 1967, in which he recommended passage of the ADEA, characterized the magnitude of the problem:

Hundreds of thousands not yet old, not yet voluntarily retired, find themselves jobless because of arbitrary age discrimination. . . . [T]here has been a persistent average of 850,000 people age 45 and over who are unemployed. . . .

Opportunity must be opened to the many Americans over 45 who are qualified and willing to work. We must end arbitrary age limits on hiring. 113 Cong. Rec. 34,743-44 (1967); *see also* S. Rep. No. 723, 90th Cong., 1st Sess. 13 (1967) (remarks of Sen. Javits) (discussing his misgivings about prior federal failure to enact legislation to protect older workers).

48. 29 U.S.C. §§ 621-634 (1982). The ADEA represents a comprehensive attack against ageism in virtually all aspects of employment. Its proscriptions apply to private and government employers, employment agencies and labor organizations. The Act prohibits both the failure or refusal to hire, and the discharge of any individual because of his age. *See id.* § 623(a)(1). It interdicts age discrimination with respect to an individual's "compensation, terms, conditions, or privileges of employment." *Id.* The classification of employees on the basis of age in order to deprive them of employment opportunities or to adversely affect their status as employees is also made illegal under the Act. *See id.* § 623(2).

49. The express purposes of the ADEA are "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b) (1982).

50. *See id.*

51. Terminating the then-common employer practice of "setting arbitrary age limits regardless of potential for job performance" was a major impetus for passage of the Act. Age Discrimination in Employment Act, Pub. L. No. 90-202, 81 Stat. 602, *reprinted in* 1967 U.S. Code Cong. & Admin. News 658; *see also* *Adams v. James*, 526 F. Supp. 80, 83 (M.D. Ala. 1981) (ADEA was enacted to abolish employer practice of disadvantaging older employees by establishing age limits without regard to individual ability).

nation, however, Congress apparently recognized that in certain limited situations differentials predicated on age or age-related criteria might be necessary. Consequently, the ADEA sanctions the use of age-based criteria where age is a bona fide occupational qualification.<sup>52</sup> The legislative history, however, provides scant guidance for courts construing the BFOQ exception,<sup>53</sup> and has engendered considerable confusion concerning its interpretation.<sup>54</sup>

In 1978, Congress amended the ADEA.<sup>55</sup> The amendments, which reaffirm Congress' mandate that employment decisions be based on indi-

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52. See 29 U.S.C. § 623(f)(1) (1982).

The ADEA's BFOQ exception closely parallels the BFOQ defense under Title VII. The major difference between the two exceptions is the substitution of the words "religion, sex, or national origin" in the latter for the word "age" in the former. Compare 29 U.S.C. § 623(f)(1) (1982) (ADEA version) with 42 U.S.C. § 2000e-2(e) (1982) (Title VII version). The similarities between Title VII and the ADEA are purposeful. Title VII was the model for the ADEA and many of the ADEA's provisions were "derived in *haec verba*" from it. *Lorillard, Inc. v. Pons*, 434 U.S. 575, 584 (1978); see also Note, *supra* note 30, at 396 n.49 (same). Although interpretations of Title VII are relevant in construing the ADEA, see *id.*, their applicability is somewhat limited because Title VII cases rarely involve public safety concerns while ADEA cases invariably do.

53. See James & Alaimo, *BFOQ: An Exception Becoming the Rule*, 26 Clev. St. L. Rev. 1, 9 (1977).

54. Congress neglected to explain why the BFOQ exception was included in the Act. One reason for its inclusion may be that the ADEA is essentially an extension of the remedial course initially charted by Congress in Title VII. See H.R. Rep. No. 805, 90th Cong., 1st Sess. 1-2, reprinted in 1967 U.S. Code Cong. & Admin. News 2213, 2214; Note, *EEOC v. City of Janesville: Promoting Age Discrimination—The Exception Becomes The Rule*, 14 J. Marshall L. Rev. 895, 897 n.11 (1981). When viewed as such, it explains the almost verbatim carrying-over into the ADEA of Title VII's BFOQ language. There were no direct references to the exception in the reports that accompanied either the Senate, Comm. on Labor and Public Welfare, ADEA of 1967, S. Rep. No. 723, 90th Cong., 1st Sess. 4 (1967), or the House, Comm. on Education and Labor, ADEA of 1967, H.R. Rep. No. 805, 90th Cong., 1st Sess. 4-5 (1967), versions of the Act. See 2 H. Eglit, *Age Discrimination*, 16-61 (1988). Virtually the only reference to the exception was made during the Senate floor debates. See 113 Cong. Rec. 31,253 (1967) (remarks of Sen. Yarborough) (offering the job of pilot as an example of when age might be a BFOQ).

55. Congress was motivated by a need to "insure that older individuals who desire to work w[ould] not be denied employment opportunities solely on the basis of age." S. Rep. No. 493, 95th Cong., 2d Sess. 1, reprinted in 1978 U.S. Code Cong. & Admin. News 504, 504.

Recognizing that a mandatory retirement age of 65 was unfair in its implicit, stereotypical assumption that workers over that age could not be productive and useful, Congress raised the mandatory retirement age from 65 to 70. See *id.* It also commissioned a study on whether the upper age limit should be raised above 70. See *id.* at 514. Realization that age 65 did not indicate automatic infirmity was based on the results of several studies which observed that in general, employees do not become unproductive at any particular age; that chronological age alone is a poor predictor of functional ability; and that many older individuals may, by virtue of their experience, actually be better employees than their younger counterparts. See *id.* at 505-06. Several cases are in accord with this last proposition. See *Johnson v. Mayor of Baltimore*, 515 F. Supp. 1287, 1298 (D. Md. 1981), *rev'd on other grounds*, 731 F.2d 209 (4th Cir. 1984), *rev'd*, 472 U.S. 353 (1985); *Aaron v. Davis*, 414 F. Supp. 453, 459 (E.D. Ark. 1976); *EEOC v. City of St. Paul*, 500 F. Supp. 1135, 1145 (D. Minn. 1980), *aff'd*, 671 F.2d 1162 (8th Cir. 1982); *Houghton v. McDonnell Douglas Corp.*, 553 F.2d 561, 564 (8th Cir.), *cert. denied*, 434 U.S. 966 (1977).

vidualized assessments,<sup>56</sup> effected a major substantive change—clarification of the BFOQ exception. First, the amendment explained Congress' position that once an employer establishes that a particular age is a BFOQ, it can "lawfully require mandatory retirement at that specified age."<sup>57</sup> In explaining the BFOQ exception, Congress provided an example of when a mandatory retirement age might be countenanced. According to Congress, in some "particularly arduous [areas of] law enforcement activity," an employer might be justified in concluding that most employees over a given age would be unable to continue to perform their jobs and that individualized appraisals of employee performance would be either impossible or impractical.<sup>58</sup>

In addition to congressional interpretation of the BFOQ exception, first the Department of Labor ("DOL"),<sup>59</sup> and later the Equal Employ-

56. See S. Rep. No. 493, 95th Cong., 2d Sess. 3, *reprinted in* 1978 U.S. Code Cong. & Admin. News 504, 506. Congress emphasized that the decision to retire should be "an individual option" and that where a person is physically and psychologically able to continue working, he should not be dismissed on the basis of unsupported misconceptions concerning the degenerative effects of aging on his ability. *Id.*

57. *Id.* at 523.

58. Specifically, Congress stated:

For example, in *certain* types of *particularly arduous* law enforcement activity, there *may* be a factual basis for believing that substantially all employees above a specified age would be unable to continue to perform safely and efficiently the duties of their particular jobs, *and* it may be impossible or impractical to determine through medical examinations, periodic reviews of current job performance and other objective tests the employees' capacity or ability to continue to perform the jobs safely and efficiently.

*Id.* at 513-14 (emphasis added).

This example of a BFOQ, ostensibly offered to clarify the situation in which a valid BFOQ might be established, has generated more confusion than clarity. Some courts have broadly interpreted the example as Congress' blanket approbation of a mandatory retirement age for all protective service employees. See, e.g., *Mahoney v. Trabucco*, 738 F.2d 35, 40 (1st Cir.), *cert. denied*, 469 U.S. 1036 (1984); *Beck v. Borough of Manheim*, 505 F. Supp. 923, 926 (E.D. Pa. 1981). This interpretation is inconsistent with the plain meaning of the language used by Congress. Congress deliberately distinguished between non-strenuous activity, generally arduous activity, and particularly arduous activity. Only employees with particularly arduous duties were the focus of the example. See Note, *The BFOQ in Law Enforcement: Guardian of Public Safety or Conduit for Arbitrary Discrimination?*, 17 Stetson L. Rev. 787, 805 (1988). This interpretation similarly ignores that Congress stated only that there might be a factual basis for establishing a valid BFOQ—this does not mean that there will always be one, and in the absence of a factual basis supported by objective empirical evidence, the exception is unavailable. Finally, because protective service work encompasses varying degrees of arduousness, employers must be cognizant of the requirements and rigors of individual jobs when invoking the BFOQ exception, otherwise it will be so broadly applied that it will engulf the rule in contravention of authority requiring a narrow interpretation of the exception. See generally Note, *The Scope of the Bona Fide Occupational Qualification Exemption Under the Age Discrimination in Employment Act*: *EEOC v. City of Janesville*, 57 Chi.-[Kent L. Rev. 1145 (1981); Note, *supra* note 54.

59. Enforcement of the ADEA was originally the province of the Department of Labor. See 29 U.S.C. § 625 (1975).

The primary relevance of the DOL's interpretations is the discussion of differentiations based on reasonable factors other than age, see 29 C.F.R. §§ 860.103-104 (1976), not the explanation of the BFOQ defense. See *id.* § 860.102. The DOL specifically contemplated

ment Opportunity Commission ("EEOC"),<sup>60</sup> were authorized to issue guidelines and regulations to aid in administering the Act.<sup>61</sup> Although these interpretations lack the force of law,<sup>62</sup> they are nevertheless "entitled to considerable weight."<sup>63</sup>

Both the DOL<sup>64</sup> and the EEOC<sup>65</sup> interpretations assert that the BFOQ defense is to be "narrowly construed" and is to "have limited scope and application."<sup>66</sup> The agencies also specify that whether a given qualifica-

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that physical fitness requirements, based on periodic physical screenings, might constitute a legitimate foundation for treating employees differently if the requirements were "reasonably necessary for the specific work to be performed" and if they were applied equally to all employees, regardless of age. *Id.* § 860.103(f)(1)(i).

According to the DOL:

[A] differentiation based on a physical examination, but not one based on age, may be recognized as reasonable in certain job situations which necessitate stringent physical requirements due to inherent occupational factors such as the safety of the individual employees or of other persons in their charge, or those occupations which by nature are particularly hazardous.

*Id.* § 860.103(f)(1)(ii).

The DOL, however, instituted a caveat. It warned that a claim for differentiation would not be approved when based solely on the employer's subjective assumptions that all employees over a certain age generally become unable to discharge the duties of the job in question. *See id.* § 860.103(f)(1)(iii). Rather, the employer had to provide a factual justification for treating employees dissimilarly. Thus, an employer claiming that physical fitness was essential to the normal operation of its business was not relegated solely to the BFOQ exception—any employee, regardless of his membership in the ADEA's protected class, could be dismissed for failure to meet the employer's physical requirements. The only limitation, however, was on the employer's ability to arbitrarily enforce these requirements.

60. In 1978, enforcement responsibility was transferred to the Equal Employment Opportunity Commission. *See* Reorganization Plan No. 1 of 1978, 92 Stat. 3781, 43 Fed. Reg. 19,807 (May 9, 1978). The EEOC undertook an extensive review of all of the interpretations previously issued by the Department of Labor and subsequently issued its own interpretations, which were effective September 29, 1981. *See* 29 C.F.R. § 1625 (1988). Although the EEOC's interpretations effectively rescinded the DOL's prior ones, *see* 46 Fed. Reg. 47724 (1981), there are several substantive similarities. *See infra* notes 64-68 and accompanying text.

61. *See* H.R. Rep. No. 805, 90th Cong., 1st Sess. 6, reprinted in 1967 U.S. Code Cong. & Admin. News 2213, 2219.

62. *See* 2 H. Eglit, *supra* note 54, at 16-9.

63. *Orzel v. City of Wauwatosa Fire Dep't*, 697 F.2d 743, 748 (7th Cir.), *cert. denied*, 464 U.S. 992 (1983); *accord* *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971); *Johnson v. American Airlines, Inc.*, 745 F.2d 988, 993 (5th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985).

64. *See* 29 C.F.R. § 860.1 (1976).

65. *See* 29 C.F.R. § 1625.6 (1988).

66. 29 C.F.R. § 860.102(b) (1976); 29 C.F.R. § 1625.6(a) (1988). The Supreme Court has adopted this interpretation. *See Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 412 (1985).

The DOL furnished limited illustrations of situations where age might be a BFOQ. *See* 29 C.F.R. § 860.102(c)-(e) (1976). It primarily referred to situations where the federal government had already established compulsory age limitations for public safety purposes, such as the FAA's "age sixty rule," codified at 14 C.F.R. § 121.383(c) (1988), which mandatorily retires commercial airline pilots at age 60. *See Aman v. FAA*, 856 F.2d 946, 947-48 (7th Cir. 1988). Note, however, that along with its policy of mandatory retirement for commercial airline pilots, the FAA has implemented elaborate testing pro-

tion is a BFOQ is to be determined on a case-by-case basis.<sup>67</sup>

The EEOC's clarifications of the BFOQ exception are important because they substantively parallel the *Tamiami/Criswell* standard.<sup>68</sup> The EEOC's interpretation, however, contains a stipulation that limits the broad discretion accorded employers under *Tamiami*<sup>69</sup> by requiring the employer to prove that mandatory retirement actually furthers its interest in promoting public safety and that no equally effective, but less discriminatory alternatives are available.<sup>70</sup> This qualification, however, was

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cedures which annually examine pilots for health problems. *See* EEOC v. Boeing Co., 843 F.2d 1213, 1216 (9th Cir.), *cert. denied*, 109 S. Ct. 222 (1988).

Conversely, the EEOC refrained from offering any examples, fearing that even general examples would be viewed as having "received the imprimatur of the Commission." 46 Fed. Reg. 47,725 (1981).

67. *See* 29 C.F.R. § 860.102(b) (1976); 29 C.F.R. § 1625.6(a) (1988). The Supreme Court is also in accord with this interpretation. *See* *Criswell*, 472 U.S. at 411.

A major problem in interpreting what is reasonably necessary to the essence of a protective service employer's business is the fact that the nature of this employment cannot be characterized uniformly. Certain areas of protective service work are irrefutably hazardous and physically demanding. The degree of peril and physical strain of any particular area, however, depends on several factors. An important factor is the actual work performed. *See generally* EEOC v. City of St. Paul, 500 F. Supp. 1135, 1138 (D. Minn. 1980) (firefighting, for example, is "the most hazardous of all civilian occupations in terms of both job-related injuries and deaths"), *aff'd*, 671 F.2d 1162 (8th Cir. 1982). Other factors include geographic and demographic factors, particularly population of the region in which the employer operates, *see generally* Kossman v. Calumet County, 600 F. Supp. 175, 177 (E.D. Wis. 1985) (law enforcement operations in heavily populated metropolitan areas are more dangerous and arduous than in rural, less populated areas), *rev'd in part, vacated in part*, 800 F.2d 697 (7th Cir. 1986), *cert. denied*, 479 U.S. 1088 (1987); Note, *Age Discrimination and Police Employment Practices*, 4 Hofstra Lab. L.J. 153, 153 n.3 (1986) ("a police officer working in New York City will be subject to more high pressure situations which require quick thinking and strenuous activity, than will a police officer working in a small, rural, Mid-West town"), and the number of employees on the force, *see generally* EEOC v. Missouri State Highway Patrol, 748 F.2d 447, 456 (8th Cir. 1984) (on large forces, less senior employees usually hold more risky and physically challenging positions while higher ranking officers are more likely to occupy supervisory and administrative positions), *cert. denied*, 474 U.S. 828 (1985); EEOC v. City of Minneapolis, 537 F. Supp. 750, 752-53, 757 (D. Minn. 1982) (same); *Retirement Policies*, *supra* note 11, at 171-72 (same).

68. The interpretation states:

An employer asserting a BFOQ defense has the burden of proving that (1) the age limit is reasonably necessary to the essence of the business, and either (2) that all or substantially all individuals excluded from the job involved are in fact disqualified, or (3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age.

29 C.F.R. § 1625.6(b) (1988). This interpretation was issued after the Fifth Circuit's decision in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (1976), but before the Supreme Court's decision in *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985).

69. 531 F.2d at 236 n.30 ("We believe that courts must afford employers substantial—though not absolute—discretion in selecting specific safety standards and in judging their reasonableness.").

70. The interpretation provides:

If the employer's objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact.

not expressly adopted by the Supreme Court in *Western Air Lines, Inc. v. Criswell*.<sup>71</sup>

Thus, the ADEA, with certain limited exceptions, expresses Congress' intent to eradicate arbitrary age discrimination in employment. Because the BFOQ exception was intended to be narrowly construed,<sup>72</sup> however, courts must interpret the defense in a manner consistent with the ADEA's primary objective of encouraging individualized, age-neutral employment decisions. In refusing to require that protective service employers implement minimum physical standards, courts have broadened the scope of the BFOQ exception by ignoring the emphasis placed by Congress and the administrative agencies on individual ability and testing.

The failure to require the use of minimum physical standards is flawed for essentially three reasons. First, generic assumptions about age and ability directly conflict with Congress' recognition that "chronological age alone is a poor indicator of ability to perform a job,"<sup>73</sup> and its belief in the basic civil right of people to be judged according to their ability "to perform a job rather than on the basis of stereotypes about race, sex, or age."<sup>74</sup>

Second, both Congress, in its 1978 clarification of the BFOQ exception,<sup>75</sup> and the DOL, in its interpretive bulletin,<sup>76</sup> specifically contemplated the use, by employers, of objective medical examinations and other age-neutral techniques to assess employee job performance.<sup>77</sup> Although Congress sanctioned the use of age as a proxy in limited circumstances,<sup>78</sup> many employers have ignored this directive by failing to

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29 C.F.R. § 1625.6(b) (1988).

71. 472 U.S. 400 (1985).

Although agency interpretations of an act are persuasive authority, courts are not required to defer to them. See *Udall v. Tallman*, 380 U.S. 1, 16 (1965). In *Criswell*, the Supreme Court neither formally adopted nor repudiated this part of the EEOC's interpretations when it enunciated the proper standard under the BFOQ exception. Although one commentator has suggested that it was not adopted, see 2 H. Eglit, *supra* note 54, at 16-64, an argument that it was tacitly incorporated can be advanced. First, the EEOC did not rescind this section of the interpretation following *Criswell*. Second, the *Criswell* Court, in a footnote, acknowledged the existence of this particular qualification when it cited the text of 29 C.F.R. § 1625.6(b). See *Criswell*, 472 U.S. at 416 n.24.

72. See *supra* note 66 and accompanying text.

73. S. Rep. No. 493, 95th Cong., 2d Sess. 2, reprinted in 1978 U.S. Code Cong. & Admin. News 504, 505.

74. *Id.* at 506.

75. See *id.* at 514.

76. See *supra* note 59 and accompanying text.

77. Only where certain employees, because of their age, can no longer be accurately tested does their retention threaten to undermine the employer's commitment to the health and fitness of employees. See *infra* notes 213-14 and accompanying text.

78. According to Congress, mandatory retirement plans are permissible only where medical and other age-neutral tests are fallible in detecting traits in older employees that could preclude them from continuing to perform effectively. Note also that Congress' revelation that the use of objective physical testing might be impossible or impractical was made within the context of a reference only to "certain types of particularly arduous



monitor employee health and fitness at any age.<sup>79</sup>

Finally, in the absence of minimum physical standards, mandatory retirement based on a public safety argument violates the EEOC's interpretive guidelines. Merely retiring older employees does little to effectuate the employer's goal of promoting public safety.<sup>80</sup> Furthermore, because mandatorily retiring capable older workers without producing empirical evidence regarding their individual ability perpetuates the myth that they are expendable, minimum physical standards offer a less discriminatory alternative by circumscribing the employer's ability to discriminate.<sup>81</sup>

## II. THE BFOQ STANDARD AND THE IMPLICIT REQUIREMENT OF MINIMUM PHYSICAL STANDARDS

The two-pronged standard first enunciated by the Fifth Circuit in *Usery v. Tamiami Trail Tours, Inc.*,<sup>82</sup> is the product of a merger of separate principles derived from two Title VII sex discrimination cases, *Diaz v. Pan American World Airways, Inc.*<sup>83</sup> and *Weeks v. Southern Bell Telephone & Telegraph Co.*<sup>84</sup> *Diaz* contributed the first prong of the *Tamiami/Criswell* standard, which requires that the employer's asserted job qualifications be more than just tangentially related or convenient to the employer's business—they must be "reasonably necessary."<sup>85</sup> The second prong of the standard, which requires empirical data supporting an alleged correlation between age and ability, is derived from *Weeks*.<sup>86</sup>

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law enforcement activity," rather than all law enforcement activity. S. Rep. No. 493, 95th Cong., 2d Sess. 10, reprinted in 1978 U.S. Code Cong. & Admin. News 504, 513. Although not completely clear, Congress may have been referring to the fact that in certain areas, particularly firefighting, it is difficult to accurately simulate, without endangering the individual being tested, the physical conditions under which their job is performed. See EEOC v. City of St. Paul, 500 F. Supp. 1135, 1141-42 (D. Minn. 1980), *aff'd*, 671 F.2d 1162 (8th Cir. 1982); cf. EEOC v. Missouri State Highway Patrol, 748 F.2d 447, 453 (8th Cir. 1984) ("Laboratory tests cannot recreate safely the stressful, sometimes life-threatening, situations in which the Patrol members work."), *cert. denied*, 474 U.S. 828 (1985); EEOC v. City of Minneapolis, 537 F. Supp. 750, 755 (D. Minn. 1982) (same for police).

79. See, e.g., *Heiar v. Crawford County*, 746 F.2d 1190, 1198 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985); EEOC v. City of Linton, 623 F. Supp. 724, 725 (S.D. Ind. 1985); *City of Minneapolis*, 537 F. Supp. at 754.

Other employers fail to test employees beyond a pre-induction physical examination. See, e.g., EEOC v. Kentucky State Police Dep't, 860 F.2d 665, 667 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 2066 (1989); EEOC v. City of E. Providence, 798 F.2d 524, 528 (1st Cir. 1986); EEOC v. Missouri, 748 F.2d at 454.

80. In fact, it may actually lure employers and the public into a false sense of security. See *infra* note 217 and accompanying text.

81. See *infra* notes 224-25 and accompanying text.

82. 531 F.2d 224 (5th Cir. 1976).

83. 442 F.2d 385 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971).

84. 408 F.2d 228 (5th Cir. 1969).

85. *Diaz*, 442 F.2d at 388. In *Diaz*, the court ascribed a "business necessity test, not a business convenience test" to the term "reasonably necessary." *Id.* It held that only where the "essence" of an employer's business would be undermined by not hiring exclusively one sex would gender-based discrimination be sanctioned. *Id.*

86. The *Weeks* court held that in order for an employer to rely on the BFOQ excep-

Tamiami, an interstate bus company, had refused to hire applicants over the age of 40 for initial employment as drivers on the ground that being younger than age 40 was a reasonable and necessary qualification for the position.<sup>87</sup> The central issue was whether this age limit was reasonably necessary to the essence of Tamiami's business, given the considerable public safety implications involved. Specifically, the court considered whether the *Weeks* prong of the BFOQ test, which required Tamiami to empirically support its belief that the exclusion of applicants over the age of 40 was reasonably necessary to the essence of its business,

tion, it must prove "that [it] had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved." *Weeks*, 408 F.2d at 235.

Alternatively, the court noted in dictum that in certain circumstances an employer might be able to attribute the general characteristics of a group to particular members by showing that it was impossible or impractical to individually assess them. *Id.* at 235 n.5. This alternative, the *Weeks* "footnote 5" exception, is the second part of the second prong of the *Tamiami/Criswell* standard.

It was predicated on a district court decision, *Bowe v. Colgate-Palmolive Co.*, 272 F. Supp. 332 (S.D. Ind. 1967), *aff'd in part, rev'd in part* 416 F.2d 711 (1969). *Bowe's* female plaintiffs had sued under Title VII, arguing that Colgate's plant seniority system purposely discriminated against women, thereby denying them various job opportunities within the plant. The system permitted men to bid for any job within the plant but precluded women from bidding on any job which involved the lifting of more than thirty-five pounds. *See Bowe*, 416 F.2d at 715. The district court held that the system did not violate Title VII because it was predicated on a protectionist state law which set weight-lifting restrictions for women. *See id.* at 715-16.

On appeal, the Seventh Circuit rejected the district court's broad construction of the BFOQ defense and held that the system violated Title VII's mandate that individual qualifications rather than "broad class stereotypes" should be considered. *Id.* at 717. The court allowed Colgate to retain the weight lifting limit as a general guideline provided, however, that it afforded each employee "a reasonable opportunity to demonstrate his or her ability to perform more strenuous jobs on a regular basis," with successful demonstration of ability ensuring the opportunity to bid on any position their seniority entitled them to. *Id.* at 718 (emphasis added).

The *Weeks* "footnote 5" exception was adopted by *Tamiami* before *Bowe* was appealed to the Seventh Circuit. The Seventh Circuit's approach, however, is more consonant with the remedial purposes of Title VII and the ADEA than the *Weeks* "footnote 5" exception. Although it permits the use of sex as a general proxy, it gives each employee who wishes an individualized opportunity to rebut the presumption that they are incapable solely because of their membership in a given class.

87. *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 228 (5th Cir. 1976). *Tamiami* had argued that its entry level age limit was reasonably necessary to guarantee the safety of its passengers. First, it presented evidence concerning the physical and mental rigors of its "extra board" work assignment system. *Id.* at 231. Pursuant to an industry-wide policy, *Tamiami's* operation was divided into two work categories: the regular run which was available to drivers with seniority and the extra-board to which drivers with low seniority, particularly new hires, were assigned. *See id.* Extra-board drivers are on call twenty-four hours a day, seven days a week and must be prepared to drive anywhere within the continental United States at any time. *See id.* The extra-board is thus more physically and mentally demanding than regular runs. *Tamiami's* medical experts had testified that aging is accompanied by physiological changes which affect an individual's ability to drive safely and that there are no medical tests which can effectively separate chronological from functional age for bus drivers. *See id.* at 237-38. This combined evidence satisfied *Tamiami's* burden of proving that it was impossible to screen out unqualified applicants absent an entry level age limitation. *See id.* at 238.

should be modified to accommodate the public safety factor or eliminated altogether,<sup>88</sup> as the Seventh Circuit had done in an earlier bus carrier case, *Hodgson v. Greyhound Lines, Inc.*<sup>89</sup> Rather than merging *Weeks* and *Diaz*,<sup>90</sup> the *Greyhound* court opted for a rational basis standard of proof in lieu of requiring empirical evidence by substituting another Title VII case, *Spurlock v. United Airlines*,<sup>91</sup> for the *Weeks* component.<sup>92</sup>

The Fifth Circuit, however, eschewed *Greyhound's* rational basis standard and instead relied on the *Weeks-Diaz* combination. In upholding Tamiami's maximum hiring age as a BFOQ, it ruled that *Greyhound* had misinterpreted the standard established by these two cases. *Diaz* is not

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88. *See id.* at 234-35.

89. 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975). In *Greyhound*, the Seventh Circuit upheld a similar age limitation as a BFOQ. *Greyhound*, also an interstate bus carrier, had argued that its maximum hiring age of 35 for drivers was reasonably necessary to guarantee the safety of its passengers. Like Tamiami, it presented evidence concerning the physical and mental rigors of its extra-board work assignment system, *see supra* note 87 and accompanying text, and argued that this, combined with the degenerative and medically undetectable physiological changes that begin to occur around age 35, would have a magnified negative effect on older hires' driving skills. *See id.* at 863. It also argued that although it could initially screen applicants for health defects, regular scrutiny of the continued health and fitness of drivers was not feasible. *See id.* at 864.

90. In *Greyhound*, the Seventh Circuit refused to merge *Weeks* and *Diaz* on the ground that *Weeks* imposed an improperly stringent burden of proof because it did not involve public safety considerations. *See id.* at 861. *Greyhound* was distinguished from *Weeks* because the safety element in the former encompassed both *Greyhound's* passengers and the motoring public, while the latter involved only concern for the individual job applicant. *Diaz* was deemed more appropriate to accommodate the risk to public safety because the essence of Pan Am's business was identical to the essence of *Greyhound's*—the safe transportation of large numbers of passengers. *See id.* at 862.

91. 475 F.2d 216 (10th Cir. 1972). In *Spurlock*, an early Title VII case, a black applicant for the position of flight officer challenged United's requirement that applicants have a college degree and a minimum of 500 hours of flight experience. In holding that these criteria were job related, the court stated "when the job clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden to show that his employment criteria are job-related." *Id.* at 219.

92. Adopting the *Diaz* standard of proof, the court held that *Greyhound* could sustain its burden by establishing that its operations would be endangered if the entry-level age limitation were eliminated. *See Greyhound*, 499 F.2d at 862. The Seventh Circuit continued its analysis, however, ultimately adopting a rational basis standard of proof. *See id.* at 863. Relying on dictum in *Spurlock*, the court stressed that the substantial risks to public safety of *Greyhound's* hiring an unqualified applicant significantly reduced its burden of proving the necessity of its employment criteria. *See Greyhound*, 499 F.2d at 862-63. Instead of requiring *Greyhound* to prove that most applicants over age 40 could not perform safely, it held that *Greyhound* had to provide only a *rational basis* for believing that the risk of harm to its passengers would increase were it forced to eliminate the age limit. *See id.* at 863.

In upholding the age restriction, the court also noted that *Greyhound* had exercised "a good faith judgment" in promulgating the hiring policy and that it was "not the result of an arbitrary belief lacking in objective reason or rationale." *Id.* at 865. *But see Orzel v. City of Wauwatosa Fire Dep't*, 697 F.2d 743, 752 (7th Cir.) (good faith belief by defendant is insufficient under ADEA), *cert. denied*, 464 U.S. 992 (1983).

an exception to *Weeks* to be substituted in order to accommodate the presence of a compelling public safety factor; rather, the two cases represent separate elements of one unified standard.<sup>93</sup> As a basic threshold, the *Diaz* (first) prong requires that the job qualifications asserted by the employer be reasonably necessary to the essence of its business. When the essence of the employer's business implicates public safety, however, the *Diaz* prong incorporates the safety factor because the stringency of the employer's job qualifications may be increased in proportion to the safety factor as measured by "the likelihood of harm and . . . [its] probable severity . . . in [the event] of an accident."<sup>94</sup> Employer discretion in selecting job qualifications is substantial,<sup>95</sup> but not unlimited—they must be designed to, and must in fact, promote public safety.<sup>96</sup>

Once the reasonable necessity requirement under the first prong is met, the job qualifications must then satisfy the *Weeks* or second prong.<sup>97</sup> By phrasing the second prong disjunctively, however, the court ameliorated the employer's burden of proving, to a relative certainty, the inability of an entire class of employees to perform the duties of the job involved.<sup>98</sup>

*Tamiami* and related transportation cases are the paradigmatic public safety cases, involving the potential for major disaster in the event a commercial bus driver or airline pilot becomes incapacitated on the job. The potential risks to third party safety present in *Tamiami*, however, are of such magnitude that it may be inappropriate to blindly apply the result reached by the Fifth Circuit to all cases implicating public safety, particularly protective service employment. Although *Tamiami* establishes the definitive standard for evaluating BFOQ claims, those applying its standard must remain cognizant of the particular facts which were involved.<sup>99</sup>

Analysis of *Tamiami* reveals that courts rejecting the necessity of minimum physical standards under the first prong of the *Tamiami/Criswell*

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93. See *Tamiami*, 531 F.2d at 235 n.27.

94. *Id.* at 236.

95. See *id.* at 236 n.30.

96. See *id.* at 236.

According to the Supreme Court, where third party safety is implicated, *Weeks* expressly conditions the reasonable necessity of a given job qualification on its furthering the employer's interest in public safety. See *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 413 (1985).

97. See *Tamiami*, 531 F.2d at 236.

98. The incorporation of the *Weeks* "footnote 5" exception into the BFOQ test is cause for concern. One reason is the Fifth Circuit's failure to explain what grounds could constitute the impossibility of reliably differentiating qualified from unqualified individuals. Additionally, the rationale underlying the *Weeks* "footnote 5" exception was rejected when *Bowe* was appealed to the Seventh Circuit. See *supra* note 86 and accompanying text. Perhaps a more preferable alternative to the automatic mandatory retirement of protective service employees would be to provide those employees who wish to continue working an opportunity to prove their continued fitness for the job. By establishing a rebuttable presumption, the loophole under the second prong of the *Tamiami/Criswell* standard would be substantially narrowed.

99. See *Criswell*, 472 U.S. at 422.

standard have overlooked a fact critical to the Fifth Circuit's conclusion under that prong of the test—Tamiami annually subjected all drivers to a thorough physical examination.<sup>100</sup> Tamiami's strong commitment to the health of its drivers contributed significantly to its satisfying the burden of proving that a maximum hiring age, used as a proxy for driver health and fitness, was reasonably necessary to its ability to transport passengers safely.<sup>101</sup>

The third party safety factors implicated in *Tamiami* were significant, further contributing to satisfaction of the first prong of the BFOQ test. This same safety risk, however, does not necessarily exist when protective service employees are involved.<sup>102</sup> Rather, the nature of the risk varies according to the job performed.<sup>103</sup> In dictum, the *Tamiami* court recognized the potential for abuse of the particular factual situation involved when it warned that employers would have to "show a reasonable basis for [their] assessment of risk of injury/death."<sup>104</sup> *Tamiami* thus emphasizes that absent a verified danger to a number of lives, bare assertions of public safety are not necessarily enough to justify mandatory retirement schemes. Many protective service employers have failed to comply with this requirement, however, instead ascribing uniform importance to all areas of protective service employment in order to vindicate their abrogation of ADEA principles through the BFOQ exception.<sup>105</sup>

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100. See *Tamiami*, 531 F.2d at 233.

The Department of Transportation's regulations prescribed a bi-annual physical examination for inter-city bus drivers. See *id.* Tamiami's concern for the physical fitness of its drivers was stronger. In addition to a complete pre-hiring physical examination, it continued to evaluate each driver on, at minimum, an annual basis. See *id.*

101. See *id.* at 236.

102. See *Hahn v. City of Buffalo*, 596 F. Supp. 939, 953 (W.D.N.Y. 1984), *aff'd*, 770 F.2d 12 (2d Cir. 1985); *EEOC v. County of Los Angeles*, 526 F. Supp. 1135, 1141 (C.D. Cal. 1981), *aff'd*, 706 F.2d 1039 (9th Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984); *Aaron v. Davis*, 414 F. Supp. 453, 462 (E.D. Ark. 1976).

103. A state trooper who has a heart attack while driving, for example, poses a significant hazard to other motorists. In other instances, however, the real danger may be to the officer himself and no one else. See *EEOC v. Mississippi*, 654 F. Supp. 1168, 1182 (S.D. Miss. 1987), *aff'd*, 837 F.2d 1398 (5th Cir. 1988).

104. *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 238 (5th Cir. 1976). According to the Fifth Circuit, "[p]riceless as is a single life in our concept of the value of human life and our undoubted unwillingness ever to approve a practice which might kill one but not, say, twenty, we think the safety factor should be evaluated in terms of the possibility or likelihood of injury/death." *Id.*

The *Greyhound* court took a different position: "Greyhound need only demonstrate however a minimal increase in risk of harm for it is enough to show that elimination of the hiring policy might jeopardize the life of one more person than might otherwise occur under the present hiring practice." *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859, 863 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975).

105. Specifically, some employers and courts have likened protective service departments to "paramilitary" organizations. See, e.g., *EEOC v. Missouri State Highway Patrol*, 748 F.2d 447, 457 (8th Cir. 1984); *Mahoney v. Trabucco*, 738 F.2d 35, 39 (1st Cir. 1984); *EEOC v. New Jersey*, 631 F. Supp. 1506, 1509 (D.N.J. 1986); *EEOC v. Pennsylvania*, 596 F. Supp. 1333, 1344 (M.D. Pa. 1984). Under such a characterization, an

Because the risks to public safety are so significant when a common carrier is involved, the Fifth Circuit properly required a relatively high degree of reliability in the medical tests used to diagnose traits which could adversely affect a driver's ability and thus endanger passengers.<sup>106</sup> Employers undoubtedly should "err on the side of caution" whenever human life is involved.<sup>107</sup> The safety risks facing common carriers and protective service employers are, however, extremely incongruous. As a result, protective service employers have been overly cautious in demanding virtual precision in techniques to detect the presence of physiological ailments in older officers, particularly coronary artery disease ("CAD").<sup>108</sup>

The medical tests in *Tamiami* were used to detect age-related impairments in relatively young individuals before they were hired. The physiological changes precluding safe driving are relatively subtle before age 40, however, making detection difficult and contributing to the inefficacy of the tests. In a mandatory retirement context, conversely, medical and physical fitness tests are much more useful in identifying older individuals who have retained their physical vitality.<sup>109</sup> By rejecting the predictive capability of diagnostic techniques at any age, protective service employers have imposed an inappropriate standard of accuracy in order to shoehorn themselves into the *Weeks* "footnote 5" exception, and to justify their failure to implement minimum physical standards.

Additionally, the disjunctive phrasing of the second prong of the *Tamiami/Criswell* standard makes a proper inquiry under the first prong essential.<sup>110</sup> Otherwise, there is a loophole for employers who cannot empirically validate their subjective belief that all or most employees over a certain age lack the ability to perform the job in question. Most employers have relied on the second facet of the second prong, arguing that

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employee is mandatorily retired upon reaching a designated age, regardless of the actual job he performs and irrespective of the requirements and dangers of his particular position. Thus, an employee who holds a desk job could be mandatorily retired because he is presumed to be too old to perform the rigors of field work, regardless of the fact that the probability of being called to physically active duty is minimal. The employee is deemed to pose a risk to third party safety solely because he is a protective service employee. This view, however, ignores the fact that the risk of third party injury or death may be minimal or non-existent in the event this particular individual cannot perform his job. *But see* EEOC v. City of St. Paul, 500 F. Supp. 1135, 1145 (D. Minn. 1980), (recognizing that risks to public safety differ with employee rank), *aff'd*, 671 F.2d 1162 (8th Cir. 1982); *Aaron v. Davis*, 414 F. Supp. at 456-57 (same).

106. *See Tamiami*, 531 F.2d at 238.

107. *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 419 (1985); *see also Beck v. Borough of Manheim*, 505 F. Supp. 923, 926 (E.D. Pa. 1981) ("considerations of public safety merit paramount concern").

108. *See infra* notes 183-186 and accompanying text.

109. *See Heiar v. Crawford County*, 746 F.2d 1190, 1198 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985); *EEOC v. City of Minneapolis*, 537 F. Supp. 750, 755 (D. Minn. 1982); *EEOC v. County of Los Angeles*, 526 F. Supp. 1135, 1139 (C.D. Cal. 1981), *aff'd*, 706 F.2d 1039 (9th Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984).

110. *See supra* note 23 and accompanying text.

it is impossible to screen employees effectively to detect the presence of asymptomatic CAD.<sup>111</sup> Unfortunately, this focus relieves the employer of its burden of proving that a substantial portion of the individuals over the mandatory retirement age actually possess CAD, and deprives an individual of the opportunity to rebut the presumption that he does possess the trait in question.<sup>112</sup> Moreover, the absence of minimum physical standards virtually eliminates the employer's burden under the first part of the *Weeks* prong because the employer can subjectively attribute certain traits precluding safe and efficient performance to older employees, without ever establishing that younger employees do not possess them.<sup>113</sup> This result frustrates the ADEA's preference for employment determinations based on empirical evidence garnered from individualized determinations.<sup>114</sup>

### III. THE CONTROVERSY ANALYZED AND CRITICIZED

#### A. *The Flawed View Against Minimum Physical Standards*

Many jurisdictions statutorily retire protective service workers.<sup>115</sup> The existence of these statutes reflects a generalized presumption that by a certain age, physical degeneration has taken its toll on an employee's physical ability. Protective service employers assert that because the correlation between chronological age and diminished ability is normative, it provides a factual basis for believing that all or most persons over a statutory retirement age will be unable to perform safely and efficiently the rigors of their job, thus threatening the safe and efficient operation of their business.<sup>116</sup>

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111. See *infra* notes 182-213 and accompanying text.

112. The availability and accuracy of testing methods is essentially reduced to a battle of conflicting expert testimony under the second prong, with the more persuasive testimony prevailing. See *Hoefelman v. Conservation Comm'n*, 718 F.2d 281, 285 (8th Cir. 1983); Note, *Public Safety Employers' Diminishing BFOQ Burden in Age Discrimination Cases*—*EEOC v. Missouri State Highway Patrol*, 18 Creighton L. Rev. 1211, 1228, 1236 (1985).

113. Unfortunately, an employee's youth does not guarantee his ability to perform the rigors of his job. See *Aaron v. Davis*, 414 F. Supp. 453, 459 (E.D. Ark. 1976).

114. See *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 422 (1985); *Davis*, 414 F. Supp. at 461.

115. See, e.g., Cal. Gov't Code § 20980 (West Supp. 1989); *id.* § 50870 (1983); Del. Code. Ann., tit. 11, § 8323 (1987); Miss. Code. Ann. § 49-1-15 (Supp. 1988); Tenn. Code Ann. §§ 8-35-205 (1988). For a comprehensive list, see *EEOC v. Wyoming*, 460 U.S. 226, 253 n.2 (1983) (Burger, C.J., dissenting).

116. See, e.g., *EEOC v. University of Texas Health Science Center*, 710 F.2d 1091, 1094 (5th Cir. 1983); *Popkins v. Zagel*, 611 F. Supp. 809, 812 (C.D. Ill. 1985); *EEOC v. City of Minneapolis*, 537 F. Supp. 750, 754-55 (D. Minn. 1982).

Employers routinely argue that most individuals over the age of 55 lack the aerobic capacity required to support the sustained periods of physical activity which are part of protective service work. See, e.g., *EEOC v. New Jersey*, 631 F. Supp. 1506, 1510-11 (D.N.J. 1986), *aff'd*, 815 F.2d 694 (3d Cir. 1987); *Popkins*, 611 F. Supp. at 812. This, coupled with other physiological changes including reduced strength and stamina, and the correlation between age and CAD, is said to lead to the irrebuttable conclusion that younger individuals are more capable of performing the physical rigors of protective ser-

These assertions, however, ignore the fact that the aging process affects each individual differently<sup>117</sup> and that chronological age alone is a poor gauge of functional ability.<sup>118</sup> In fact, many older protective service officers have been found to be at least as physically competent as their younger counterparts.<sup>119</sup> Moreover, generalizations concerning age and physical ability ignore the value of on-the-job experience that can be attained only through years of service. Such experience tempers an officer's judgment<sup>120</sup> and may offset any diminution in physical ability.<sup>121</sup>

The First<sup>122</sup> and Eighth Circuits<sup>123</sup> adhere to the view that protective service employers need not implement minimum physical standards in order to prove that health and physical fitness are BFOQs reasonably necessary to the essence of their business. These circuit court conclusions, as well as those in a special concurrence to the Fifth Circuit's opinion in *EEOC v. Mississippi State Tax Commission*,<sup>124</sup> are representative of the flawed analyses and erroneous arguments offered to justify the failure of employers to implement minimum physical standards.

The most egregious analytical error committed by some courts is infusing a rational basis standard into the inquiry under the first prong of the *Tamiami/Criswell* standard.<sup>125</sup> In the wake of *Tamiami*, the rationality standard applied in *Greyhound*<sup>126</sup> was largely repudiated,<sup>127</sup> with the

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vice work. See generally *City of Minneapolis*, 537 F. Supp. at 754-55 (chronicling the degenerative physiological changes that generally accompany aging); *Beck v. Borough of Manheim*, 505 F. Supp. 923, 926 (E.D. Pa. 1981) (same); *EEOC v. City of St. Paul*, 500 F. Supp. 1135, 1140-41 (D. Minn. 1980) (same), *aff'd*, 671 F.2d 1162 (8th Cir. 1982).

117. See *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 409 (1985); *City of Minneapolis*, 537 F. Supp. at 755.

118. See S. Rep. No. 493, 95th Cong., 2d Sess. 2, reprinted in 1978 U.S. Code Cong. & Admin. News 504, 505.

119. See, e.g., *EEOC v. State Dep't of Highway Safety & Motor Vehicles*, 660 F. Supp. 1104, 1107 (N.D. Fla. 1986); *City of Minneapolis*, 537 F. Supp. at 755; *EEOC v. County of Los Angeles*, 526 F. Supp. 1135, 1139 (C.D. Cal. 1981); *Aaron v. Davis*, 414 F. Supp. 453, 459 (E.D. Ark. 1976).

120. See cases cited *supra* note 56.

121. See *Dep't of Highway Safety*, 660 F. Supp. at 1107; *Aaron v. Davis*, 414 F. Supp. at 459.

122. See *EEOC v. City of E. Providence*, 798 F.2d 524, 531 (1st Cir. 1986).

123. See *EEOC v. Missouri State Highway Patrol*, 748 F.2d 447, 457 (8th Cir. 1984) (first circuit court decision to explicitly reject requirement that protective service employers implement minimum physical standards before they can successfully invoke BFOQ defense), *cert. denied*, 474 U.S. 828 (1985).

124. Also representative is the special concurrence to the Fifth Circuit opinion in *EEOC v. Mississippi State Tax Commission*, 848 F.2d 526, 533-36 (5th Cir. 1988) (Jones, J., specially concurring), *vacated and remanded*, 873 F.2d 97 (5th Cir. 1989). Although the opinion was vacated, Judge Jones' concurrence, which is tantamount to a dissent, echoes the analyses and arguments of the First and Eighth Circuits.

125. See, e.g., *EEOC v. Missouri*, 748 F.2d at 450-51; *Popkins v. Zagel*, 611 F. Supp. 809, 813 (C.D. Ill. 1985); *Mahoney v. Trabucco*, 574 F. Supp. 955, 958 (D. Mass. 1983), *rev'd on other grounds*, 738 F.2d 35 (1st Cir.), *cert. denied*, 469 U.S. 1036 (1984).

126. See *supra* notes 89-92 and accompanying text.

127. See *Arritt v. Grisell*, 567 F.2d 1267, 1271 (4th Cir. 1977); *Houghton v. McDonnell Douglas Corp.*, 553 F.2d 561, 564 (8th Cir.), *cert. denied*, 434 U.S. 966 (1977); *Aaron v. Davis*, 414 F. Supp. 453, 462 (E.D. Ark. 1976). But see *Murnane v. American Air-*



overwhelming majority of courts embracing the *Tamiami* reasonable necessity standard.<sup>128</sup> Ultimately, the Supreme Court rejected the use of a rational basis standard for safety-related BFOQ claims under the ADEA in *Western Air Lines, Inc. v. Criswell*,<sup>129</sup> ostensibly precluding further reliance on a *Greyhound*-like rational basis standard. Although a rational basis standard is analytically inappropriate under the ADEA, it is an acceptable standard for the purposes of an equal protection clause analysis.<sup>130</sup> One of these equal protection cases, *Massachusetts Board of Retirement v. Murgia*,<sup>131</sup> has been impermissibly incorporated into ADEA analysis, particularly by the Eighth Circuit in *EEOC v. Missouri State Highway Patrol*.<sup>132</sup>

A rational basis standard, in effect, greatly reduces the burden for employers invoking the BFOQ defense as compared with the *Tamiami/Criswell* standard because it requires the employer to demonstrate that elimination of the job qualification would only minimally increase the

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lines, Inc., 667 F.2d 98, 101 (D.C. Cir. 1981) (combining *Tamiami* and *Greyhound*), cert. denied, 456 U.S. 915 (1982).

128. See, e.g., cases cited *supra* note 32.

129. 472 U.S. 400 (1985). In *Criswell*, the Court held that Western's policy of mandatorily retiring flight engineers at age 60, although reasonable, was not reasonably necessary to the essence of its business. See *id.* at 422-23.

130. See, e.g., *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312-13 (1976) (per curiam).

131. 427 U.S. 307 (1976) (per curiam). In *Murgia*, the Supreme Court held that mandatory retirement of state police officers at age 50 passed constitutional muster under the equal protection clause because the classification drawn by the statute was clearly *rationally related* to the State's objective of protecting the public by ensuring the physical fitness of its uniformed state police through the removal of officers who were presumptively physically unfit. See *id.* at 314-15. The Court declined to apply a strict scrutiny standard to the statute, holding that the right to government employment was not a fundamental right and that the aged were not a suspect class. See *id.* at 312-13.

132. 748 F.2d 447 (8th Cir. 1984), cert. denied, 474 U.S. 828 (1985). The Eighth Circuit noted that the highway patrol's age limitations were statutory, reflecting a legislative determination that such restrictions were in the best interest of both the general public and the patrol. See *id.* at 449-50. Although it recognized that the legislature's exercise of its judgment did not relieve the employer of its burden under the BFOQ test, the court stated that it would nevertheless "accord some deference to the state legislative declaration." *Id.* at 450. Curiously, *Murgia* was cited in support of this proposition. See *id.*

In a separate part of its analysis, the court again cited *Murgia*. First, it characterized the job requirements of a state highway patrolman as physically and mentally arduous and dangerous. See *id.* at 451. Based upon the apparent rigors of the job, the court concluded that the qualifications of physical ability and mental strength were reasonably necessary to the performance of the Patrol's functions, "and that in these terms there is a correlation between the mandatory retirement age of sixty and the safe and efficient performance of the Patrol's functions." *Id.* In support of the last part of its conclusion, however, it cited *Murgia* instead of *Tamiami*. See *id.* The court stated only that "a correlation" between age and the proper functioning of the employer's business had been established. *Id.* Because it failed to describe the strength of this relationship, however, it can be argued that by citing to *Murgia* instead of *Tamiami*, the Eighth Circuit in fact impermissibly applied a rational basis standard instead of the required reasonable necessity standard. See Note, *supra* note 112, at 1241.

probability of harm.<sup>133</sup> It also leaves employer discretion in establishing job qualifications virtually unfettered—once the employer uses the buzzwords “public safety,” the rational basis standard effectively immunizes the job requirements from judicial scrutiny because the employer must only show a good faith belief that its qualification will advance public safety interests.<sup>134</sup>

Under the *Tamiami/Criswell* standard, by contrast, the employer must establish a stronger correlation between the job qualification asserted and the third party safety factor—it must be reasonably necessary to the promotion of public safety—and the employer must prove that the asserted qualification does indeed further its overriding interest in public safety.<sup>135</sup>

The danger of reviewing legislation under a deferential rational basis standard is substantial because unless the challenged legislation is wholly arbitrary or capricious, it is “always upheld.”<sup>136</sup> Because the analysis under the ADEA represents a strict departure from the deferential rational basis standard of *Murgia*,<sup>137</sup> a court’s reliance on it for the purpose of an ADEA analysis is clearly erroneous.

Furthermore, minimum physical standards were actually present in *Murgia*.<sup>138</sup> In fact, the Court considered whether the state’s refusal to continue to assess officers after age 50, instead of mandatorily retiring them, undermined the rationality of the retirement scheme, and held that it did not.<sup>139</sup> In a footnote, the Court emphasized that individualized physical examinations strengthened the rationality of the mandatory retirement strategy by eliminating any younger officer who was not as

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133. See *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859, 862-63 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975).

134. See Note, *supra* note 18, at 1385 (“The [*Greyhound*] court’s flat assertion of the *Spurlock* rule effectively cuts off inquiry into the motivation of the employer for setting up his allegedly discriminatory age policy.”).

135. See *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 413 (1985).

136. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 319 (1976) (per curiam) (Marshall, J., dissenting); *accord Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 421-23 (1985); *Starr v. FAA*, 589 F.2d 307, 311 (7th Cir. 1978).

137. See e.g., *Orzel v. City of Wauwatosa Fire Dep’t*, 697 F.2d 743, 749 (7th Cir.), *cert. denied*, 464 U.S. 992 (1983); *Tuohy v. Ford Motor Co.*, 675 F.2d 842, 845-46 (6th Cir. 1982); *EEOC v. County of Santa Barbara*, 666 F.2d 373, 376 n.8 (9th Cir. 1982).

138. See *Murgia*, 427 U.S. at 311. All officers under age 50 were given physical examinations while those under the age of 40 were tested biannually. See *id.* Those between the ages of 40 and 50 were subjected to a more rigorous annual physical examination, including an electrocardiogram. See *id.*

139. See *id.* at 311-12. When officers were mandatorily retired at age 50, they were still in excellent physical and mental condition. See *id.* Consequently, the appellant argued that it was irrational to retire officers at the age of 50 when their health and fitness were already being monitored through annual physical examinations. See *id.*

Although the Court conceded that less discriminatory alternatives to mandatory retirement might be available, it noted that where rationality is the standard, neither the drawing of perfect classifications nor the use of the best method of differentiation is required. See *id.* at 316; cf. 29 C.F.R. § 1625.6(b) (1988) (“If the employer’s objective in asserting a BFOQ [under the ADEA] is the goal of public safety, the employer must prove that . . . there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact.”).

physically qualified as the 50-year-old officers who had, up until their mandatory retirement, demonstrated their own physical ability through the tests.<sup>140</sup>

If the presence of physical testing for all employees "augments [the] rationality"<sup>141</sup> of a mandatory retirement policy, an argument can be made that *a fortiori*, physical evaluations or standards *must* be present in order to validate mandatory retirement policies under the more stringent reasonable necessity standard. The presence of minimum physical standards and testing can be viewed as elevating the rationality of mandatory retirement under *Murgia* to the level of reasonable necessity required by the *Tamiami/Criswell* standard.

Courts that have incorrectly applied a *Murgia*-like rational basis standard under the first prong of the *Tamiami/Criswell* standard have also erred in their analysis under the second prong.<sup>142</sup> By employing a mere rationality test, these courts have permitted employers to fall short of sustaining their burden of establishing reasonable necessity under the first prong. Consequently, the judicial conclusions under the second prong are void because these courts should never have reached that stage of the analysis.

A second argument influencing courts and advanced by employers is grounded in principles of federalism. Congress has mandated retirement at age 55 for all federal firefighters and law enforcement personnel.<sup>143</sup> Consequently, some courts and employers have reasoned that if Congress can statutorily retire these federal employees in order to promote a youthful corps of employees, the judgment of state legislatures should be accorded similar deference.<sup>144</sup>

This view was rendered inappropriate, however, when the Supreme

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140. See *Murgia*, 427 U.S. at 316 n.10.

141. *Id.*

142. Following its suspect reliance on *Murgia*, the Eighth Circuit, for example, turned to the second prong, focusing on the degenerative physiological changes that accompany aging and emphasizing the diminished aerobic capacity and elevated incidence of coronary artery disease in older individuals. See *EEOC v. Missouri State Highway Patrol*, 748 F.2d 447, 451-53 (8th Cir. 1984), *cert. denied*, 474 U.S. 828 (1985). It found that because there was no effective way to distinguish between physically qualified and unqualified patrolmen over the age of 60, age-based distinctions in lieu of age-neutral physical screenings to monitor the continued health and fitness of employees were required. See *id.* at 453-54. *Contra EEOC v. New Jersey*, 631 F. Supp. 1506, 1508, 1511 (D.N.J. 1986) (New Jersey state police have a comprehensive fitness and health screening program for all officers, despite alleged inefficacy of certain medical tests, including those to assess the presence of asymptomatic CAD), *aff'd*, 815 F.2d 694 (3d Cir. 1987).

143. See *supra* note 8 and accompanying text.

144. See, e.g., *EEOC v. Missouri*, 748 F.2d at 455-56 (court noted in dictum that it was influenced by presence of mandatory retirement policy for federal law enforcement personnel); *Johnson v. Mayor of Baltimore*, 731 F.2d 209 (4th Cir. 1984) (holding that statutory requirement that federal fire-fighters retire at age 55 establishes, as a matter of law, that age 55 constitutes a BFOQ for state and local firefighters), *rev'd*, 472 U.S. 353 (1985); *Retirement Policies*, *supra* note 11, at 13-14.

Court, in *Johnson v. Mayor of Baltimore*,<sup>145</sup> held that Congress' decision to forcibly retire federal firefighters at age 55 was not based on Congress' belief that age 55 was a BFOQ for that profession,<sup>146</sup> and may have been based on nothing more than stereotypical assumptions.<sup>147</sup> Because it could not discern Congress' intent in mandating retirement at age 55 for federal firefighters and law enforcement officers, it held that the statute could not be viewed as representing a "congressional determination that age is an occupational qualification for" these positions.<sup>148</sup>

Irrespective of *Johnson*, there are other problems with reliance on the presence of the federal retirement scheme. First, a protective service employer's failure to require any of its officers to undergo annual physical evaluation completely "belies any claim that it [actually] thinks [its force] should be composed of 'active, vigorous, physically capable men.'" <sup>149</sup> Second, the constitutionality of federal mandatory retirement statutes is judged under a lenient rational basis test,<sup>150</sup> rather than the ADEA's more stringent reasonable necessity standard.<sup>151</sup> Finally, ADEA claims must be analyzed on an individual factual basis.<sup>152</sup> Congress' statutory mandate of retirement for one group of federal employees does not necessarily mean that compulsory retirement is similarly appropriate for all employees in that profession. Establishing a BFOQ for state and local protective service workers on the basis of a federal statute ignores the fact that the two groups of employees may "operat[e] under different working conditions and perform[ ] significantly different job functions."<sup>153</sup>

Another argument against minimum physical standards was advanced

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145. 472 U.S. 353 (1985).

146. *See id.* at 363-64.

147. *See id.* at 365-66. According to the Court:

[N]either the language of the 1974 amendment nor its legislative history offers any indication why Congress wanted to maintain the image of a "young man's service," or why Congress thought that 55 was the proper cutoff age, or whether Congress believed that older employees in fact could not meet the demands of these occupations.

*Id.* at 365.

148. *Id.* at 367.

149. *Heiar v. Crawford County*, 746 F.2d 1190, 1199 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985) (quoting H.R. Rep. No. 463, 93d Cong., 1st Sess. 3 (1973)).

150. *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312-313 (1976) (*per curiam*); *Vance v. Bradley*, 440 U.S. 93, 96-97 (1979); *Starr v. FAA*, 589 F.2d 307, 313-14 (7th Cir. 1978).

151. *See Orzel v. City of Wauwatosa Fire Dep't*, 697 F.2d 743, 749 (7th Cir.), *cert. denied*, 464 U.S. 992 (1983).

152. *See supra* notes 32, 68.

153. *Orzel*, 697 F.2d at 749; *accord EEOC v. Pennsylvania*, 596 F. Supp. 1333, 1339 (M.D. Pa. 1984), *rev'd on other grounds*, 829 F.2d 392 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 1109 (1988); *cf. Tuohy v. Ford Motor Co.*, 675 F.2d 842, 843 (6th Cir. 1982) (presence of federal FAA "age 60 rule" for commercial airline pilots does not necessarily establish age 60 as a BFOQ for non-commercial pilots). *But see Retirement Policies, supra* note 11, at 16 (stating that duties of federal, state and local protective service employees are "equally hazardous, equally demanding, and equally stressful").

by the First Circuit in its leading case, *EEOC v. City of East Providence*.<sup>154</sup> The argument centered on the fact that the Third Circuit, which had previously considered the minimum physical standards issue, did not, as a matter of law, require the enforcement of minimum physical standards before health and physical fitness could be considered reasonably necessary to the essence of the state police's business.<sup>155</sup> This conclusion, however, is no longer valid. On a subsequent appeal, the Third Circuit held that absent minimum physical standards for all employees, the Pennsylvania state police department could not justify its mandatory retirement policy "by relying on good health and physical conditioning as BFOQs reasonably necessary to [its] business."<sup>156</sup> In dictum, the Third Circuit explicitly repudiated *EEOC v. City of East Providence*, noting that it represents "precisely the kind of employment discrimination that Congress sought to eliminate by enacting the ADEA."<sup>157</sup>

Another judicial determination is that employers do not have to enforce minimum physical standards, but rather, can rely on their *belief* that most officers below the mandatory retirement age could meet such standards and that officers over the age in question could not.<sup>158</sup> Such a view is flawed—it reflects precisely the thinking that the ADEA was intended to eliminate,<sup>159</sup> and conflicts with the ADEA's requirement that employers empirically validate their assumptions.

Nor do minimum physical standards mandate that an employer's screening procedures be perfect.<sup>160</sup> What the Act does demand, however, is that an employer make some effort to require of its younger officers the qualifications it seeks to impose on its older ones.<sup>161</sup> When an

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154. 798 F.2d 524 (1st Cir. 1986). *City of E. Providence* was the second court of appeals decision to formally reject a minimum physical standards requirement. The EEOC had filed suit on behalf of five former city police officers who were forced to retire at age 60 pursuant to a local ordinance. *See id.* at 526. It argued that retirement of state police officers at age 60 was not reasonably necessary to the essence of the department's business because the department made absolutely no effort to ensure that younger officers could meet the physical fitness standards imposed on older employees through their mandatory retirement. *See id.* at 528-29.

155. *See id.* at 529. The EEOC had argued that minimum physical standards were required under *EEOC v. Pennsylvania*, 768 F.2d 514 (3d Cir. 1985), in which the Third Circuit held that assumptions concerning the reasonable necessity of good health and physical strength were improper in the absence of factual findings to that effect. *See City of E. Providence*, 798 F.2d at 529. The Third Circuit was particularly troubled by the fact that the state police made absolutely no attempt to monitor the health and fitness of any of its employees, permitting some with known disabilities to remain on the job. *See id.*

156. *EEOC v. Pennsylvania*, 829 F.2d 392, 395 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 1109 (1988).

157. *Id.* at 396.

158. *See City of E. Providence*, 798 F.2d at 529 n.4. The Court also stated that the City did not have to "weed out" unfit younger officers and that a failure to do so would not undermine "its goal of maintaining a reasonably adequate force most of whose officers possess the requisite physical capabilities." *Id.*

159. *See EEOC v. Pennsylvania*, 829 F.2d at 396.

160. *See City of E. Providence*, 798 F.2d at 529.

161. *See EEOC v. Pennsylvania*, 829 F.2d at 396.

employer strives for only an adequately fit force, the retention of older employees does not undermine this level of mediocrity. It is only when the employer sets particular standards so that retention of possibly unfit employees actually subverts its commitment to health and fitness that mandatory retirement is reasonably necessary within the scope of the ADEA's BFOQ exception.<sup>162</sup> Furthermore, the distinctions drawn by most protective employers are impermissibly arbitrary because they establish inconsistent standards for employees—physical perfection for older officers which is accomplished through mandatory retirement, and nothing more than adequacy for younger officers.

Courts have also rejected the analytical importance, under the first prong of the *Tamiami/Criswell* standard, of the actual establishment of physical fitness programs by protective service employers. According to the First Circuit,<sup>163</sup> for example, New Jersey's institution of a complete fitness evaluation program for its state police does not lead to the conclusion that absent such tests, physical strength and stamina are not reasonably necessary job requirements.<sup>164</sup> The First Circuit's conclusion is flawed, however, because it ignores the emphasis that the New Jersey district court placed on the presence of the department's program when it held that the State was likely to prevail at trial on the ADEA claim filed against it.<sup>165</sup> According to the New Jersey district court, the presence of the State's comprehensive physical screening and fitness program established the reasonable necessity of mandatory retirement—the use of age as a proxy for health and fitness—to the safe and efficient performance of the department's business.<sup>166</sup>

That nothing more than a minimal commitment to health and fitness is required to satisfy the first prong of the *Tamiami/Criswell* standard is also refuted by the New Jersey district court's recognition that had the state police made absolutely no attempt to monitor fitness, allowing officers with serious disabilities to remain on duty, it is more likely that the qualifications would not have been deemed reasonably necessary to the essence of the department's business.<sup>167</sup>

The requirement of minimum physical standards has also been characterized as an unnecessary "addendum" to the first prong of the *Tamiami/Criswell* standard<sup>168</sup> because an employer's failure to imple-

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162. See, e.g., *EEOC v. New Jersey*, 631 F. Supp. 1506, 1508-10 (D.N.J. 1986), *aff'd*, 815 F.2d 694 (3d Cir. 1987).

163. See *EEOC v. City of E. Providence*, 798 F.2d 524 (1st Cir. 1986).

164. See *id.* at 530.

165. A constant theme underlying the district court's analysis was that the program demonstrated the department's strong commitment to employee health and fitness. See *EEOC v. New Jersey*, 620 F. Supp. 977, 987 (D.N.J. 1985). Not only did the department monitor its employees through a comprehensive program, it also sanctioned employees for non-compliance either by assigning them to limited duty or by involuntarily retiring them. See *id.* at 986.

166. See *EEOC v. New Jersey*, 631 F. Supp. at 1507, 1508-09, 1514.

167. See *EEOC v. New Jersey*, 620 F. Supp. at 983-84.

168. See *EEOC v. Mississippi State Tax Comm'n*, 848 F.2d 526, 534 (5th Cir. 1988).

ment them is merely evidence of a lack of commitment to the health and fitness of its employees.<sup>169</sup> It has also been warned that minimum physical standards "do not necessarily correlate with or replicate the job duties of law enforcement, and to that extent, they are a potentially misleading gauge of what is 'reasonably necessary.'"<sup>170</sup> It is the absence of any standards, however, that makes this true. The job qualifications are more likely to be inaccurate and misleading because they are never tested against a reasonable standard—what the majority of employees are physically capable of.

Other arguments admonish that minimum physical standards would be expensive,<sup>171</sup> would force employers to dismiss or discipline officers who fail to meet the standards leading to diminished employee morale,<sup>172</sup> would be elevated over job performance,<sup>173</sup> and would impede the employer's ability to continue affirmative action plans because older employees would not be mandatorily retired.<sup>174</sup>

These arguments, however, are flawed. First, although at some point the cost of implementing physical standards may prove onerous for local governments, their implementation can result in financial benefits such as a reduction in workers' compensation<sup>175</sup> and disability claims,<sup>176</sup> thereby lowering insurance premiums. Second, any preference for the morale of younger employees to the detriment of older ones is characteristic of the differential treatment of older individuals that was targeted by the ADEA.<sup>177</sup> Third, concern that job performance will be overlooked is misplaced because employers have largely ignored performance—many BFOQ plaintiffs were capable of successfully performing their jobs and yet were forced to retire.<sup>178</sup>

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(Jones, J., specially concurring), *vacated and remanded*, 873 F.2d 97 (5th Cir. 1989); see also Note, *Proving That Over Age Sixty is Over the Hill for Police Officers: EEOC v. Pennsylvania*, 62 St. John's L. Rev. 361, 368-69 (1988) (additional requirement is unfair in placing an "onerous burden on employers seeking to justify mandatory retirement policies").

169. See *EEOC v. Mississippi State Tax Comm'n*, 848 F.2d at 535.

170. *Id.* at 534.

171. See *id.* at 535; *Retirement Policies*, *supra* note 11, at 15; *infra* note 182 and accompanying text.

172. See *EEOC v. Mississippi State Tax Comm'n*, 848 F.2d at 535; *Retirement Policies*, *supra* note 11, at 50.

173. See *EEOC v. Mississippi State Tax Comm'n*, 848 F.2d at 535.

174. See *Retirement Policies*, *supra* note 11, at 85.

175. See *id.* at 39.

176. See *id.* at 171.

177. Attention to the morale of younger employees ignores the detrimental psychological effects of mandatory retirement on workers who are suddenly informed that because of their age, they cannot continue to do what they may be fully capable of doing. See S. Rep. No. 493, 95th Cong., 2d Sess. 4, *reprinted in* 1978 U.S. Code Cong. & Admin. News 504, 507.

178. See, e.g., *Orzel v. City of Wauwatosa Fire Dep't*, 697 F.2d 743, 746 (7th Cir.), *cert. denied*, 464 U.S. 992 (1983); *EEOC v. County of Santa Barbara*, 666 F.2d 373, 376 (9th Cir. 1982).

Finally, although employment opportunity through affirmative action is laudatory, this

The final, and perhaps major argument advanced by virtually all protective service employers is that chronological age must be substituted for individualized physical evaluation because there is no way to safely and accurately screen for the presence of asymptomatic coronary artery disease,<sup>179</sup> which can result in a heart attack or non-traumatic sudden death.<sup>180</sup> Employers argue that age is the primary indicator of cardiac risk and that because the probability of a cardiac episode increases during periods of physical exertion, older employees have a significantly higher risk of heart attack during the performance of their job duties than do younger ones.<sup>181</sup> This argument is used to satisfy both the employer's burden under the second prong of the *Tamiami/Criswell* standard and to explain its failure to implement minimum physical standards under the first prong.<sup>182</sup>

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author questions whether it should involve the sacrifice of one group of employees to the benefit of another group. Note, however, that the implementation of minimum physical standards is not intended to bar an employer from mandatorily retiring older workers. Rather, its purpose is to ensure that if physical requirements are imposed on older officers by requiring their retirement, younger employees are also subject to scrutiny of their physical ability.

179. See, e.g., *EEOC v. Missouri State Highway Patrol*, 748 F.2d 447, 453 (8th Cir. 1984), *cert. denied*, 474 U.S. 828 (1985); *Hoefelman v. Conservation Comm'n*, 718 F.2d 281, 285-86 (8th Cir. 1983); *EEOC v. New Jersey*, 620 F. Supp. 977, 994 (D.N.J. 1985). But see *EEOC v. State Dep't of Highway Safety & Motor Vehicles*, 660 F. Supp. 1104, 1107-08 (N.D. Fla. 1986) (safe and non-intrusive methods for detecting the presence of coronary artery disease are available); *EEOC v. County of Los Angeles*, 526 F. Supp. 1135, 1141 (C.D. Ca. 1981) (the risk that an individual will suffer a heart attack is "highly predictable"), *aff'd*, 706 F.2d 1039 (9th Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984); *Johnson v. Mayor of Baltimore*, 515 F. Supp. 1287, 1299 (D. Md. 1981) (individual testing to assess the level of cardiac risk is possible), *rev'd on other grounds*, 731 F.2d 209 (4th Cir. 1984), *rev'd*, 472 U.S. 353 (1985).

180. Coronary artery disease is the leading cause of death in this country in individuals both above and below age 65. See Harrison's Principles of Internal Medicine 1014 (11th ed. 1987) [hereinafter Principles of Internal Medicine]. Coronary arteries supply blood to the heart muscle. See *EEOC v. New Jersey*, 620 F. Supp. at 991. As an individual ages, there is a gradual thickening of the artery wall, causing blockages which pose a significant health risk because they can prevent the heart from receiving a sufficient oxygen supply, ultimately resulting in a heart attack or non-traumatic sudden death, particularly during periods of peak physical activity. See *id.*

181. See *EEOC v. Pennsylvania*, 645 F. Supp. 1545, 1551 (M.D. Pa. 1986), *vacated and remanded*, 829 F.2d 392 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 1109 (1988); *EEOC v. New Jersey*, 620 F. Supp. at 994; *Beck v. Borough of Manheim*, 505 F. Supp. 923, 926 (E.D. Pa. 1981); *Retirement Policies*, *supra* note 11, at 81.

182. Some employers have also argued against individualized screenings on the ground that they are expensive. See *EEOC v. Pennsylvania*, 645 F. Supp. at 1555-56; *EEOC v. State Dep't of Highway Safety & Motor Vehicles*, 660 F. Supp. 1104, 1108 (N.D. Fla. 1986); *Retirement Policies*, *supra* note 11, at 15. This argument is invalid, however, because economic considerations cannot serve as the basis for a BFOQ. See *Smallwood v. United Air Lines*, 661 F.2d 303, 307 (4th Cir. 1981), *cert. denied*, 456 U.S. 1007 (1982); *Galvin v. Vermont*, 598 F. Supp. 144, 149 (D. Vt. 1984); *Hahn v. City of Buffalo*, 596 F. Supp. 939, 953 (W.D.N.Y. 1984), *aff'd*, 770 F.2d 12 (2d Cir. 1985); cf. *City of Los Angeles v. Manhart*, 435 U.S. 702, 712 & n.23 (1978) (same proscription exists under Title VII). This restriction was initially instituted in order to prevent employers from retiring older workers who, because of their senior status tend to command higher salaries, and replacing them with younger, less expensive workers. See 29 C.F.R. § 860.103(h) (1978).



Medical testimony in BFOQ litigation has centered primarily on the availability of techniques to screen individuals for coronary artery disease. Defendants' medical experts generally argue that the only method which can conclusively detect the presence of silent CAD is cardiac catheterization,<sup>183</sup> an invasive and risky procedure that rarely is used diagnostically.<sup>184</sup> Focusing on cardiac catheterization, however, ignores other less invasive diagnostic techniques, particularly the exercise stress test,<sup>185</sup> combined with simultaneous consideration of cardiac risk factors—certain "conditions and habits present more frequently in individuals who develop CAD than in the general population."<sup>186</sup>

The results of this combination appear to be an extremely accurate short-term predictor of the likelihood that a given individual will have a cardiac event.<sup>187</sup> Yet, defendants' medical experts have continually rejected its predictive value.<sup>188</sup> Although many risk factors are easily detectable,<sup>189</sup> virtually the only one consistently recognized is the most

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The rationale was subsequently extended to a complete interdiction of the use of financial arguments to justify age discrimination under the BFOQ exception.

183. See, e.g., *Dep't of Highway Safety*, 660 F. Supp. at 1108; *EEOC v. New Jersey*, 620 F. Supp. 977, 991 (D.N.J. 1985).

Cardiac catheterization involves the insertion of a catheter into the patient's vein so that x-rays can be taken of the coronary artery. See *id.*

184. Cardiac catheterization can result in bleeding, loss of a limb through blood clotting, and can actually induce a heart attack and even death. See *id.*

185. See *Principles of Internal Medicine*, *supra* note 180, at 1018. During the test, a subject is connected to an electrocardiogram monitor while walking on a treadmill. As the test progresses, grade and speed are increased, with the effects of increased stress on the heart monitored by the EKG. Its results are not perfect, however; subjects with coronary artery disease have tested negative and vice versa. See *EEOC v. New Jersey*, 620 F. Supp. at 992-94; *EEOC v. City of St. Paul*, 500 F. Supp. 1135, 1142 (D. Minn. 1980), *aff'd*, 671 F.2d 1162 (8th Cir. 1982). As a result, most protective service employers have imputed only a limited usefulness to it. See, e.g., *EEOC v. Missouri State Highway Patrol*, 748 F.2d 447, 453 (8th Cir. 1984), *cert. denied*, 474 U.S. 828 (1985); *EEOC v. New Jersey*, 620 F. Supp. at 992-93; see also *City of St. Paul*, 500 F. Supp. at 1141-42 (exercise stress test does not simulate actual environmental factors that create physical and mental stress on the job, further reducing accuracy in employment areas such as firefighting).

186. *Principles of Internal Medicine*, *supra* note 180, at 1019. According to the risk factor concept, "a person with at least one risk factor is more likely to develop [CAD] and is likely to do so earlier than a person with no risk factors." *Id.*

187. See *EEOC v. County of Los Angeles*, 706 F.2d 1039, 1044 (9th Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984); *EEOC v. State Dep't of Highway Safety & Motor Vehicles*, 660 F. Supp. 1104, 1108 (N.D. Fla. 1986).

Short-term prediction is all that is required. In a *Tamiami*-like hiring situation, the employer must evaluate what is likely to happen to an employee prospectively over the long-term and there is uncertainty about the physiological effects of prolonged exposure to physical stress. With current employees, conversely, the effects of continuous exposure to long-term physical demands have begun to accrue and consequently, can be more easily assessed. By subjecting employees to these tests at least annually, even gradual changes in medical profile should be apparent.

188. See, e.g., *EEOC v. Missouri*, 748 F.2d at 453; *EEOC v. New Jersey*, 620 F. Supp. at 993.

189. See *Hahn v. City of Buffalo*, 596 F. Supp. 939, 951 (W.D.N.Y. 1984), *aff'd*, 770 F.2d 12 (2d Cir. 1985).

obvious—aging.<sup>190</sup>

Risk factors can be categorized by their level of reversibility.<sup>191</sup> The irreversible risk factors are gender,<sup>192</sup> genetic traits,<sup>193</sup> and age.<sup>194</sup> The completely reversible factors are cigarette smoking,<sup>195</sup> hypertension<sup>196</sup> and obesity.<sup>197</sup> The partially reversible factors are triglyceride and cholesterol levels,<sup>198</sup> low HDL levels,<sup>199</sup> and hyperglycemia and diabetes mellitus.<sup>200</sup> Other factors such as physical activity,<sup>201</sup> diet and the nature of the job performed<sup>202</sup> are also related to and can accelerate the incidence of CAD.

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190. See, e.g., *Dep't of Highway Safety*, 660 F. Supp. at 1107; *EEOC v. New Jersey*, 620 F. Supp. 977, 994-95 (D.N.J. 1985). Aging is only one of several important factors, however, all of which interact synergistically. Additionally, most CAD sufferers below age 65 have at least one identifiable risk factor other than "aging per se." See *Principles of Internal Medicine*, *supra* note 180, at 1019.

191. See *Principles of Internal Medicine*, *supra* note 180, at 1019.

192. Males are at a higher risk of developing CAD than women. See *id.*

193. There are indications that premature CAD may be familial. See *id.* This is important because it illustrates that a younger officer is not necessarily immune, especially if there is a family history of premature heart disease.

194. Aging is an extremely complex risk factor because many other factors such as hypertension are age-related. See *id.* at 1019.

195. Cigarette smoking is an extremely potent risk factor. One-pack-a-day smokers are 70 percent more likely to die prematurely from CAD than non-smokers. See *id.* at 1021. Recognizing this danger, several jurisdictions have imposed no smoking regulations on protective service employees. See *Retirement Policies*, *supra* note 11, at 107-08.

196. Middle-aged hypertensive men have more than five times the risk of CAD than do individuals without hypertension. See *Principles of Internal Medicine*, *supra* note 180, at 1021. Physical activity and diet may even be causally linked to age-related hypertension. See *id.* at 1021-22.

197. Abdominal obesity is directly related to the incidence of CAD. See *id.* at 1021.

198. Recent studies indicate that cholesterol levels may actually be the best predictor of heart disease. See *EEOC v. State Dep't of Highway Safety & Motor Vehicles*, 660 F. Supp. 1104, 1107 (N.D. Fla. 1986).

There is a direct correlation between elevated cholesterol and triglyceride levels and premature CAD, with at least a three to five-fold increase in the risk of myocardial infarction in individuals between the ages of 30 and 49, see *Principles of Internal Medicine*, *supra* note 180, at 1019, an age range well below all mandatory retirement ages.

199. HDL (high-density lipoprotein) levels are inversely related to the development of premature CAD—the higher the HDL level, the lower the likelihood that an individual will develop CAD. See *id.* at 1020. Extrinsic factors also affect HDL—smoking decreases HDL levels while regular strenuous exercise increases them. See *id.* at 1021.

200. See *id.* at 1021.

Diabetics are at least twice as likely as non-diabetics to have heart problems, with a marked increase in this risk for younger diabetics. See *id.*

201. Studies indicate that the more physically active an individual is the less susceptible he is to sudden cardiac death. See *id.*

202. Data suggests that firefighters are twice as likely to develop chronic heart and lung disease by their early fifties as the general population. See *Retirement Policies*, *supra* note 11, at 55; see also *EEOC v. City of St. Paul*, 500 F. Supp. 1135, 1140-41 (D. Minn. 1980) (higher incidence of heart and lung disease in firefighters than in general population), *aff'd*, 671 F.2d 1162 (8th Cir. 1982).

This provides an excellent argument for mandatory retirement at age 55 for firefighters. The validity of the argument, however, is severely undercut when a fire department refuses to assess the cardiac health of younger firefighters who smoke, or who are overweight or who have elevated cholesterol levels. This lack of compulsory evaluation

Although analysis of cardiac risk factors may be substantially probative in screening for the presence of CAD,<sup>203</sup> a question unanswered by courts is the degree of accuracy employers should demand of tests to detect CAD. Protective service employers have argued that public safety concerns mandate the relative precision of techniques such as cardiac catheterization, which they then reject because of its dangers. By requiring certainty of detection, however, employers undermine their ability to effectively serve the public by ignoring the risk factors which can lead to the premature development of CAD in younger individuals who, because of their lower seniority, are more likely to be assigned to physically active duty.<sup>204</sup>

Overlooking these risk factors or according them minimal attention seriously belies the legitimacy of employer concerns about the dangers of CAD. The younger field officer or firefighter who is out of shape, or who smokes, is arguably a likelier candidate for a heart attack than is the older administrative officer who possesses only one risk factor—his age.<sup>205</sup> If an employer is honestly concerned that an employee with CAD may not be able to handle the physical strain of his job, it is inconsistent to retain a younger officer with *known* CAD while mandatorily retiring his older co-worker on the suspicion that he *may* suffer from CAD.<sup>206</sup> Furthermore, implementing minimum physical standards will encourage employees to remain physically active in order to meet them, providing an ancillary benefit—reduction in their overall susceptibility to developing CAD.<sup>207</sup>

### B. Minimum Physical Standards—Why They Are Necessary

The opposite view, adopted by two Circuit Courts of Appeal outright and by a third under certain circumstances, is that as a matter of law, protective service employers are precluded from satisfying the first prong of the *Tamiami/Criswell* standard in the absence of the development and enforcement of minimum physical standards for all employees.<sup>208</sup>

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endangers not only the public, but also the firefighter, particularly if he is unaware that an easily correctable risk factor may amplify an already exaggerated risk.

203. See, e.g., *EEOC v. Kentucky State Police Dep't*, 860 F.2d 665, 667 (6th Cir. 1988), cert. denied, 109 S. Ct. 1066 (1989); *EEOC v. State Dep't of Highway Safety & Motor Vehicles*, 660 F. Supp. 1104, 1107 (N.D. Fla. 1986); *Hahn v. City of Buffalo*, 596 F. Supp. 939, 951 (W.D.N.Y. 1984), aff'd, 770 F.2d 12 (2d Cir. 1985).

204. On many protective service forces, older, higher-ranking employees tend to hold supervisory or administrative positions. See, e.g., *EEOC v. University of Texas Health Science Center*, 710 F.2d 1091, 1093 (5th Cir. 1983); *EEOC v. City of Minneapolis*, 537 F. Supp. 750, 757 (D. Minn. 1982); *Retirement Policies*, supra note 11 at 166-67. A corollary to this is that younger, less senior officers are generally assigned to more physically active duty.

205. See generally *Retirement Policies*, supra note 11, at 167.

206. See *EEOC v. Kentucky*, 860 F.2d at 667; *EEOC v. Tennessee Wildlife Resources Agency*, 859 F.2d 24, 26 (6th Cir. 1988), cert. denied, 109 S. Ct. 1342 (1989).

207. See *Retirement Policies*, supra note 11, at 39, 170.

208. See *EEOC v. Kentucky*, 860 F.2d at 669 (held statute mandating retirement at age 55 for state police officers violative of ADEA); *EEOC v. Tennessee*, 859 F.2d at 26

When Congress promulgated the ADEA, it recognized that although the aged may not be a " 'discrete and insular' " minority,<sup>209</sup> they do require special protection from a history of arbitrary discrimination in employment. Consequently, the ADEA imposes a stringent burden of proof on employers, requiring them to prove that their mandatory retirement policies do in fact further their overriding interest in promoting public safety.<sup>210</sup> In the absence of minimum physical standards, however, the mandatory retirement of protective service employees at some presumptive age of physical incapacity is only rationally related to furthering the employer's interest in public safety. It is undoubtedly rational for a protective service employer to retire older employees—they may present a health risk which can interfere with the employer's primary function of promoting the safety of the general public. Older employees are also easier to isolate than younger ones with health and fitness problems. Mandatory retirement, however, has no appreciable effect on promoting public safety when an employer refuses to identify and sanction younger officers with health problems.

Although periodic physical tests may have some degree of imprecision, they are still "useful both in spotting existing physical disabilities and in identifying high-risk individuals,"<sup>211</sup> and employers that are seriously concerned with the physical and mental fitness of their employees have used them to identify individuals with high-risk traits.<sup>212</sup> Only when physical standards and testing are imposed for all employees does the margin of error in such tests bolster the employer's claim that mandatory retirement is reasonably necessary for certain presumptively high-risk individuals who can no longer be tested accurately.<sup>213</sup>

When an employer makes a legitimate effort to examine all employees for traits which preclude safe and effective performance, retirement of older officers is reasonably necessary. Otherwise, the employer's evident commitment to health and fitness may be undermined by the higher risks older officers face, and for which they can no longer be accurately tested. Absent minimum physical standards, however, it is virtually irrelevant to the promotion of public safety whether a small number of older employees actually possess certain traits, because the employer makes no effort to ensure that the majority of its force—younger employees—do not pos-

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(EEOC successfully challenged statute requiring wildlife officers to retire at age 55); *EEOC v. Mississippi*, 837 F.2d 1398, 1402 (5th Cir. 1988) (invalidating statute prescribing both a maximum hiring age and a mandatory retirement age for state conservation officers); *EEOC v. Pennsylvania*, 829 F.2d 392, 396 (3d Cir. 1987), (rejecting reasonable necessity of statute mandatorily retiring all uniformed state police officers at age 60), *cert. denied*, 108 S. Ct. 1109 (1988).

209. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (per curiam) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53, n.4 (1938)).

210. See *supra* note 96 and accompanying text.

211. *Heiar v. Crawford County*, 746 F.2d 1190, 1198 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985); see also cases cited *supra* note 109.

212. See *Heiar*, 746 F.2d at 1198.

213. See *id.*

sess them.<sup>214</sup> In some instances, younger officers with known physical ailments have been permitted to remain on active duty.<sup>215</sup> Moreover, many older employees in excellent health/physical condition have been retired.<sup>216</sup> This dichotomous treatment is actually more detrimental to the public than the retention of older officers. Younger employees are likely to be assigned to physically active field duty, and because they lack the experience and judgment of older employees, they are more likely to find themselves in dangerous situations.<sup>217</sup>

Second, although the ADEA does not prohibit employers from assuming a correlation between age and physical ability, it does proscribe the retention of some employees and the mandatory retirement of others based on subjective stereotypical belief alone—the employer must provide some factual foundation to support its assumptions.<sup>218</sup> In the absence of minimum standards for all employees, older workers are singled out for retirement without any regard to whether they are still competent to discharge the duties of their jobs. Conversely, younger employees are judged competent solely by virtue of their age.

Employers need not develop tests that can perfectly monitor and differentiate between physically fit employees and unfit ones; rather, they need only establish a factual basis on which a court could determine that good health and physical ability are BFOQs reasonably necessary to the essence of its business.<sup>219</sup> “[T]here is no essential qualification that age can stand as a proxy for,” however, when employers fail to determine whether younger employees do indeed have these qualifications and to what degree.<sup>220</sup> Yet many protective service employers, because they fail to periodically screen employees, are relatively unaware of the level of fitness of any of their officers, young or old.<sup>221</sup> Moreover, other employers are unfamiliar with the effects of aging on the performance of their

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214. See *EEOC v. Pennsylvania*, 829 F.2d 392, 396 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 1109 (1988).

215. See, e.g., *EEOC v. Kentucky State Police Dep't*, 860 F.2d 665, 667 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 1066 (1989); *EEOC v. Mississippi*, 654 F. Supp. 1168, 1176 (S.D. Miss. 1987), *aff'd*, 837 F.2d 1398 (5th Cir. 1988); *EEOC v. City of Bowling Green*, 607 F. Supp. 524, 525 (W.D. Ky. 1985).

216. See, e.g., *Orzel v. City of Wauwatosa Fire Dep't*, 697 F.2d 743, 746 (7th Cir.), *cert. denied*, 464 U.S. 992 (1983); *EEOC v. State Dep't of Highway Safety*, 660 F. Supp. 1104, 1105 (N.D. Fla. 1986); *EEOC v. Mississippi*, 654 F. Supp. 1168, 1176 (S.D. Miss. 1987), *aff'd* 837 F.2d 1398 (5th Cir. 1988); *City of Bowling Green*, 607 F. Supp. at 525.

217. See *Retirement Policies*, *supra* note 11, at 166-67.

218. See *supra* note 27 and accompanying text.

219. See *EEOC v. Mississippi*, 837 F.2d 1398, 1400 (5th Cir. 1988).

220. See *EEOC v. Mississippi*, 837 F.2d at 1400 (emphasis in original); see also *EEOC v. Mississippi State Tax Comm'n.*, 873 F.2d 97, 102 (5th Cir. 1989) (Rubin, J., concurring in part, dissenting in part).

221. See, e.g., *EEOC v. State Dep't of Highway Safety & Motor Vehicles*, 660 F. Supp. 1104, 1107, 1110 (N.D. Fla. 1986); *EEOC v. City of Bowling Green*, 607 F. Supp. 524, 525 (W.D. Ky. 1985); *EEOC v. City of Minneapolis*, 537 F. Supp. 750, 754 (D. Minn. 1982); see also *Retirement Policies*, *supra* note 11, at 37 (majority of police and fire departments are unfamiliar with officer fitness levels due to lack of periodic physical fitness/health screening).

officers.<sup>222</sup>

Age-neutral minimum physical standards also provide a vehicle for eliminating employer reliance on stereotype by subjecting all employees to uniform job requirements, rather than mandatorily retiring older individuals based upon a presumed lack of physical ability.<sup>223</sup> They offer a non-discriminatory opportunity for empirically validating an employer's opinion that younger employees are physically capable and its suspicion that older ones are either physically incompetent or untestable.

Third, minimum physical standards remedy the arbitrary and differential treatment of older employees because a BFOQ is justified only when substantially all of them either regularly fail to meet the minimum standards, or where it is actually unfeasible to develop and implement testing to determine individual ability. Although the ultimate result of compulsory retirement for older employees may still be the same, it would be based on actual proof of inability rather than speculation, and more importantly, the retention of younger officers would not be based on assumptions concerning youth and ability.

Fourth, the implementation of such standards ensures that the employer's qualifications are supported by objective fact and that they are legitimately imposed.<sup>224</sup> These standards circumscribe the broad discretion in establishing job qualifications that is afforded employers under *Tamiami*.<sup>225</sup> They prevent the imposition of job qualifications that are unduly stringent or arbitrary because they compel the employer to prove that younger employees can indeed meet these standards, thereby making it difficult for an employer to impose qualifications designed to subvert the Act. They are also objectively neutral rather than subjective, representing a validated level of ability possessed by the majority of the officers on the force.

Fifth, minimum physical standards serve as a basic check on "an employer's discretion in establishing a BFOQ defense."<sup>226</sup> In the absence of an inquiry under the first prong, the analysis under the second is reduced to an evidentiary battle of expert witnesses, with no empirical proof that the requirements in question are indeed reasonably necessary.<sup>227</sup> Minimum physical standards provide a threshold hurdle that the employer must overcome in order to reach the second prong of the test, thus closing a major loophole under the second prong of the standard.

Sixth, an employer's failure to implement minimum physical standards betrays the legitimacy of its avowed concern for the health and fitness of its employees, and reflects the fact that such qualifications are not really

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222. See, e.g., *EEOC v. City of Minneapolis*, 537 F. Supp. 750, 754 (D. Minn. 1982).

223. See *EEOC v. Mississippi*, 837 F.2d 1398, 1401 (5th Cir. 1988).

224. See *id.*

225. See *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236 n.30 (5th Cir. 1976).

226. *EEOC v. Mississippi*, 837 F.2d at 1401.

227. See *supra* note 112 and accompanying text.

reasonably necessary.<sup>228</sup> Employers continually fail to take any steps to monitor the continued health and fitness of employees.<sup>229</sup> In some cases, officers were actually hired with known physical disabilities,<sup>230</sup> while in others, officers with serious and known medical problems, including heart conditions, were retained.<sup>231</sup> The forced retirement of older employees thus represents a selective enforcement of the employer's job requirements and is an unjustifiable abrogation of their right under the ADEA to be free from arbitrary and discriminatory treatment.

Finally, by implementing minimum physical standards combined with a program of regular testing, protective service employers stand to reap two substantial benefits. First, they may be able to avoid having to use the BFOQ exception to justify their decisions. The ADEA does not prohibit an employer from disciplining or dismissing an employee for good cause,<sup>232</sup> irrespective of whether the employee is within the class protected under the Act. By enforcing legitimate minimum physical standards on a non-discriminatory basis, the failure of an employee to meet the standards required for his particular job would be grounds for dismissal for cause.<sup>233</sup> The Act also permits employers to base differential treatment of employees on reasonable factors other than age.<sup>234</sup> If all employees are required to meet objective, age-neutral physical standards that are directly related to the job duties performed, the employer could claim that its employment determinations are based on a reasonable factor other than age—physical fitness.

The implementation of minimum standards also may significantly reduce the evidentiary difficulties employers have encountered in some jurisdictions under the second prong of the *Tamiami/Criswell* standard. Specifically, the employer would need to invoke the BFOQ exception only where it seeks to mandatorily retire older employees rather than continuing to subject them to physical testing. By implementing minimum physical standards for all employees, its evidentiary burden under the first prong of the *Tamiami/Criswell* standard would be met.

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228. See, e.g., *EEOC v. Tennessee Wildlife Resources Agency*, 859 F.2d 24, 26 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 1342 (1989); *EEOC v. Pennsylvania*, 829 F.2d 392, 395 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 1109 (1988); *Heiar v. Crawford County*, 746 F.2d 1190, 1198-99 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985).

229. See cases cited *supra* note 221.

230. See *EEOC v. Mississippi State Tax Comm'n*, 848 F.2d 526, 532-33 (5th Cir. 1988), *vacated and remanded*, 873 F.2d 97 (5th Cir. 1989); *EEOC v. Mississippi*, 654 F. Supp. 1168, 1174 (S.D. Miss. 1987), *aff'd* 837 F.2d 1398 (5th Cir. 1988).

231. See cases cited *supra* note 215.

232. See 29 U.S.C. § 623(f)(3) (1982).

233. See *Retirement Policies*, *supra* note 11, at 108-09.

234. See 29 U.S.C. § 623(f)(1) (1982). Under the reasonable factors other than age defense, the employer is permitted to make hiring and firing decisions regarding older employees if it "can demonstrate that such action resulted from consideration of factors other than chronological age, such as job performance." Comment, *Age Discrimination in Employment—The Bona Fide Occupational Qualification Defense—Balancing the Interest of the Older Worker in Acquiring and Continuing Employment Against the Interest in Public Safety*, 24 Wayne L. Rev. 1339, 1342 (1978).

Under the second prong, if the employer finds that its tests for assessing compliance with its minimum physical standards are impractical or impossible to accurately administer to older employees, or if it can demonstrate that most older employees routinely fail these tests, invocation of the BFOQ exception would be appropriate. Ultimately, the implementation of minimum physical standards might provide protective service employers with actual empirical evidence to support their suppositions concerning the diminished physical ability of older employees, obviating the need to rely on expert medical testimony that a court may or may not find persuasive.

#### CONCLUSION

In promulgating the ADEA, Congress recognized that employment determinations should be based on individual ability rather than age. Although the BFOQ exception was intended to be a narrow deviation from this rule, it has been impermissibly extended where protective service employers are concerned. By failing to require the implementation of minimum physical standards under the first prong of the *Tamiami/Criswell* standard, courts have ignored both congressional intent under the Act and the administrative guidelines issued in interpretation of it. Minimum physical standards are required in order to comply with Congress' purpose in promulgating the ADEA, to limit employer discretion in applying the BFOQ exception in circumvention of the ADEA and to promote physically fit protective service forces at all ages.

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